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A NEW

ABRIDGMENT OF THE LAW.

BY MATTHEW BACON,

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TYTHES.*

The word *Tithe* is derived from the *Saxon* word Teoba, which signifies the tenth part of a thing.

Of every thing, of which tithe is due of common right, tithe is always the tenth part of the thing.

But of every thing, of which tithe is only due by custom, more or less than the tenth part of the thing may be due for tithe.

[For where custom only subjects to tithe, custom must determine the proportion.

Tithes, in their proper and original nature, are a spiritual and incorporeal inheritance: spiritual, from the uses to which they are consecrated; incorporeal, from the mode of their existence

There is no doubt that tithes were originally a mere ecclesiastical revenue;(*a*) ecclesiastical persons only having capacity to take them;(*b*) and ecclesiastical courts only having power to take cognisance of them. They were considered, not as any secular duty,(*c*) or as issuing out of the land, but as collateral to the estate of the land, and were paid, not in respect of the land,(*d*) but in respect of the persons of the laity, in return for the benefit they derived from the ministry and care of their spiritual pastors. They could not pass by copy of court-roll,(*e*) because things spiritual could not lie in tenure, or be considered as parcel of a manor: unity of possession(*g*) could not extinguish them, because the spiritual nature could not be merged or extinguished; in other words, could not coalesce or incorporate with that which was material and temporal: nor could a release of all demands in lands operate as a discharge of them;(*h*) for as they would not pass under the denomination of land, neither would they be effected by a release of all claims arising out of lands.

(*a*) Moor, 530; Hob. 296. (*b*) 2 Co. 43 b; 5 Co. Cawdrie's case. (*c*) 1 Leon. 300. (*d*) Day, 5 b, 6 a. (*e*) Cro. Eliz. 293, 814. (*g*) Dav. 6 a. (*h*) 1 Leon. 300.

Tithes, again, in their essence, have nothing substantial or permanent: they consist merely *in jure*, are merely a right. An estate in tithes is no more than a title to a share or portion of the produce after it shall have been separated from the general mass: before severance it is wholly uncertain what the amount of that share or portion may be; nay more, its very existence is precarious; this, like its quantity, depending upon the accidents of climate, season, soil, cultivation, and the will and caprice of the several owners or possessors. If the ground be not sown, if the farms be not stocked, if the fruits be not gathered, no tithe can possibly arise. For tithe is payable, as we have said before, not in respect of the land, but of the person: it is not an estate in the land, but a right to a determinate proportion of the fruits, with all the industry and expense that have been bestowed in bringing them forward and collecting them. Tithe, then, in itself, is not an object of our external senses: it is neither visible, nor tangible; its produce, indeed, may be seen and felt, but it exists itself only

[* The Editor was induced to transpose this head, in expectation of being able to make some valuable additions to it.]

in the mind's eye, and in contemplation of law. It follows, therefore, that it is incorporeal: for the law ascribes corporeity only to those objects which are substantial and permanent. From their incorporeity tithes are said to lie in grant, and not in livery; that is, they could not pass from one man to another by livery of seisin, the ancient mode of transfer, nor could actual possession be given of them; but the property in them could only be transferred by deed. In consequence of their incorporeity it was doubted, whether a rent could be reserved upon them; for being incapable of locality, there was no place where a distress could be taken of them. And to obviate this doubt a statute was passed, which empowers ecclesiastical persons to grant leases for lives or years of their incorporeal hereditaments. Of the king's right to reserve a rent on a demise of tithes no doubt indeed was ever entertained; because by the prerogative the king had a right to distrain upon any lands in the possession of his lessee.
2 Bl. Comm., 5 G. 3, c. 7.

But the revolution which took place in our ecclesiastical polity in the time of Henry the Eighth has almost entirely changed the nature of this species of property; and there now seems to be scarcely any difference between an inheritance in lands and an inheritance in tithes. When the benefices which the regular clergy had appropriated to themselves fell, upon the dissolution of the monasteries, into the hands of the king, he was prompted by his profuseness, and induced by policy, to make grants of them to lay-persons. But in order that the tithes might answer the purposes of civil life, and accommodate themselves to the exigencies of their new proprietors, it became necessary to secularize them, and to endue them with all the qualities of real property. For this purpose an act of parliament was passed; so that tithes in the hands of a lay-person may now be treated like any other kind of property: they may be put in view in an assize: they are demandable in a *præcipe quod reddat:* they are subject to dower: fines may be levied, and recoveries may be suffered of them: ejectments may be brought for them: in short, they have all the properties and all the incidents of a lay-fee, except that they lie in grant, and not in livery: a distinction which now marks no great difference, since the statute of frauds allows no interest of any permanency to pass even in real property, unless the grant be attested by some written instrument.
32 H. 8, c. 7, § 8; 3 Wils. 30.]

Under this title it will be proper to show,

(A) Of what Things Tithe is in general due.

(B) Who are liable to the Payment of a personal Tithe.

(C) Of what Things a predial Tithe is due.

1. *Of Agistment.*
2. *Of Corn.*
3. *Of Hay.*
4. *Of Wood.*
5. *Of divers other Things.*

(D) Of what Things a mixed Tithe is due.

1. *Of the Young of a Beast.*
2. *Of the Eggs or Young of a Bird or Fowl.*
3. *Of Wool.*
4. *Of divers other things.*

(E) To whom Tithe is in general to be paid.

(A) Of what Things Tithes are in general due.
(F) To whom parochial Tithes are to be paid.
(G) To whom extra-parochial Tithes are to be paid.
(H) Of the Right to a Portion of Tithes in a Parish.
(I) By whom Tithe is to be paid.
(K) What Tithes are to be deemed small Tithes.
(L) How far the Custom of a Parish is to be regarded in the setting out of Tithes.
(M) Of the Time and Manner of paying personal Tithes, where there is no Custom in a Parish.
(N) Of the Time and Manner of setting out predial Tithes, where there is no Custom in a Parish.
(O) Of the Time and Manner of setting out or paying mixed Tithes, where there is no Custom in a Parish.
(P) Of the Time and Manner of paying Tithes due by Custom.
(Q) In what Cases the Payment of Tithes may be suspended.
1. *Of the Produce of Lands in the King's Hands.*
2. *Of the Produce of Lands which have been barren.*
3. *Of the Produce of Glebe Lands.*
4. *Of Discharge of Payment of Tithes by Composition real.*
(R) Of a *Modus decimandi.*
1. *In general.*
2. *Of the Certainty required in a* Modus.
3. *Of a* Modus *which amounts to a Prescription in* non decimando.
4. *Of a* Modus *which has not been constantly paid.*
5. *Of a leaping* Modus.
6. *Of a* Modus *which is too rank.*
7. *Of a* Modus *which is liable to fraud.*
8. *Of a* Modus *for such persons as live out of the Parish.*
9. *Of the extent of a* Modus.
(S) Of a Prescription in *Non decimando.*
(T) Of a Discharge of Tithes by Grant.
(U) Of a Discharge of Tithes by Bull.
(W) Of a Discharge of the Payment of Tithes by Order.
(X) Of a Discharge of the Payment of Tithes by Unity of Possession.
(Y) Of Agreements and Leases concerning Tithes.
(Z) Of a Suit in a Spiritual Court for Subtraction of Tithe.
(Aa) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tithe.
(Bb) Of a Suit in a Court of Equity for Subtraction of Tithe.
(Cc) Of a Suit in a Court of Equity to establish a *Modus*, or a customary Manner of setting out Tithe.
(Dd) Of an Action upon the Statute against Subtraction of Tithe.
(Ee) Of recovering in a summary Way the Value of small Tithes subtracted.
(Ff) Of recovering Tithe due from Quakers.
(Gg) What Remedy the Occupier has, when the Person entitled to the Tithe set out does not fetch it away in a reasonable Time.

(A) Of what Things Tithes are in general due.

TITHES of some things are due of common right, of others by custom. Tithe is not due of common right of any fruit of the earth which does not renew annually.

(A) Of what Things Tithes are in general due.

Tithe, which arises from a fruit of the earth, can never be part of the land from which it arises, but must always be collateral thereto.

11 Rep. 13; Cro. Eliz. 161, 216; Cro. Ja. 452.

Nay, tithe is so collateral to the land from which it arises, that if a lease be made of the glebe belonging to a rectory, with all the profits and advantages thereof, and there be a covenant, that the rent to be paid shall be in full satisfaction of every kind of exaction and demand belonging to the rectory; yet, if the glebe be not expressly discharged of tithe, the lessee shall be liable to the payment of tithe for the glebe.

11 Rep. 13, Priddle v. Napier; Cro. Eliz. 161. ‖See *post*, head (Q).‖

Tithe is not due of common right of the produce of a mine or quarry; because such produce does not renew annually, but is the substance of the earth, and has perhaps been so for many years.

Fitz. N. B. 53; Bro. *Dism.* pl. 18; 2 Inst. 651; 1 Roll. Abr. 637; Cro. Eliz. 277.

But tithe may be due by custom of the produce of a mine or quarry.

2 Vern. 46, Buxton v. Hutchinson; ‖Gwill. Tithe Ca. 535.‖

Tithe is not due of common right of lime; the chalk, of which it is made, being part of the soil.

1 Roll. Abr. 637, pl. 5.

Tithe is not due of common right of bricks; because these are made of earth.

2 Mod. 77, Stoutfield's case.

Tithe is not due of common right of turf or gravel; because both these are part of the soil.

1 Mod. 35.

It has been holden, that tithe is not due of common right of salt; because this is not a fruit of the earth.

1 Roll. Abr. 642, S. pl. 8.

But every one of these things, and all things of the like kind, may by custom be liable to the payment of tithe.

1 Roll. Abr. 642, S. pl. 7, pl. 8.

Tithe is not due of common right of a house; because tithe is only due of common right of such things as renew annually.

11 Rep. 16, Graunt's case.

But houses in London are by a decree,(*a*) which was confirmed by an act of parliament, made liable to the payment of tithe.

2 Inst. 659; 37 H. 8, c. 12. ‖(*a*) This decree, dated 24th February, 1545–6, ordered, that the inhabitants of London should pay tithes to the parsons, vicars, and curates, at the rate of 1*s.* 4½*d.* for every 10*s.* rent, and of 2*s.* 9*d.* for every 20*s.* rent by the year. The statute 37 H. 8, c. 12, enacted, that the decree, when concluded, "and enrolled in the King's High Court of Chancery of record, should stand, remain, and be as an act of parliament." After repeated searches, no enrolment has ever been discovered. It appears from the authentic edition of the statutes, published by the Commissioners of Public Records, that the decree is not inserted in the earliest printed copies of the statutes of the year; that it does not form part of the act entered on the enrolment of the statute in Chancery, nor is it enrolled in Chancery, nor annexed to the original act preserved in the Parliament-office. From a copy of the endorsement on the decree entered in the Register Book of the Bishop of London in St. Paul's cathedral, it appears that the decree, signed and sealed, was delivered, the day after the date, to Bonner Bishop of London, by the Archbishop, &c., whose names are signed thereto; and that the bishop delivered it to his registrar for safe custody. The original instrument has not been found. The binding force of the decree under the statute depending on its

enrolment in Chancery, and no enrolment having been found, the question has been much agitated, whether an enrolment can, at this distance of time, and after acquiescence in the decree to a great extent, be presumed. In Hallam v. Adams, 23 Car. 1, K. B. Roll. 1834, in an action for assault and false imprisonment, where the defendant justified under the decree, and the plaintiff replied the non-enrolment, on which issue was joined, the jury appear to have found that the decree was enrolled in Chancery. A like verdict is said to have been found in the Exchequer, (Branston v. Cook, 1657,) but the record has not been found. In Anon. 1 Vent. R. 257, the court are reported to have said, "If a record be lost, it may be proved to a jury by testimony; as the decree in Henry the Eighth's time for tithes in London is lost, "yet it has been often allowed that there was one." In Macdougall v. Purrier, the plaintiff by his bill claimed tithe of the defendant, an inhabitant of St. Helen's, Bishop-gate street, on the footing of the act of parliament and decree; and on the suit coming on for hearing, Sir John Leach, M. R., directed an issue, whether the decree was duly enrolled; adding, that if he were the judge, he should direct the jury to presume an enrolment. An appeal to the House of Lords from this decree is now pending. See 2 Eag. on Tithes, 462; and see M'Dougall v. Young, 2 Carr. & Pa. Ca. 278; Owen v. Nodin, M'Clel. 239; 3 Eag. & Youn. 1149; Tyrwhitt's "Argument on the non-enrolment of the decree." (1823.) As the statute and decree create a special jurisdiction before the Lord Mayor for recovery of the tithes under the decree, it is doubtful whether an action at common law can be maintained for them. Meadhouse v. Taylor, Noy, 130; Eag. & Youn. 172; M'Dougall v. Young, 2 Carr. & Pa. Ca. 278. But the jurisdiction of the Courts of Chancery and Exchequer is not excluded by the act. Kynaston v. Miller, Dick. 773; 2 Ves. J. 567; Gwill. 903; Eag. & Youn. 196; Ivatt v. Warren, 3 Eag. & Youn. 1203; Gwill. 1054; Warden of St. Paul's v. Crickett, 2 Ves. J. 363; Eag. & Youn. 417; Gwill. 1425. For the decisions in the Court of Chancery and Exchequer as to the construction of the act and decree, see Toller on Tithes, ch. 9; Mirehouse on Tithes, p. 2, c. 7; Eagle on Tithes, c. 17. And as to the provision for the clergy in those parishes where the churches were destroyed by the fire of London, see 44 G. 3, c. 89.‖

And before this decree many houses in London were by custom liable to the payment of tithe, the quantum to be paid being thereby only settled as to such houses for which there was no customary payment.

2 Inst. 659; Hard. 116; Gilb. Eq. Rep. 193, 194.

There is in most ancient cities and boroughs a custom to pay tithe of houses; without which there would not be in many parishes a proper maintenance for the clergy.

11 Rep. 16, Graunt's case; Bunb. 102.

It was holden by three barons of the Exchequer, Price, Montague, and Page, contrary to the opinion of Bury, Chief Baron, that two tithes may be due of the same thing, one of common right, the other by custom.

Bunb. 43, Earl of Scarborough v. Hunter.

(B) Who are liable to the Payment of a personal Tithe.

Such tithe as arises from the profit of a man's personal labour, in the exercise of an art, trade, or employment, is called a personal tithe.

2 Inst. 649.

A personal tithe is only to be paid of the clear gain which arises from the personal labour of a man, after deducting all charge and expense, according to the estate, condition, or degree of the man.

2 Inst. 62, 658.

By the 2 & 3 Ed. 6, c. 13, §17, common day-labourers are exempted from the payment of a personal tithe.

‖By 2 & 3 Ed. 6, c. 13, §7, it is enacted, that all and every person exercising merchandises, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of persons and in such places as heretofore within these forty years have accustomably used to pay such

personal tithes, or of right ought to pay, (other than such as have been common day-labourers,) shall yearly, at or before the feast of Easter, pay for his personal tithes the tenth part of his clear gains; his charges and expenses, according to his estate, condition, and degree, to be thereon abated, allowed, and deducted.

And by § 8. Provided always, that in all such places where handicraftsmen have used to pay their tithes within these forty years, the same custom of payment of tithes is to be observed and continue.‖

Servants in husbandry are not liable to the payment of a personal tithe; for by their labour the tithes of many things are increased.

1 Roll. Abr. 646, pl. 1.

A miller is liable to the payment of a personal tithe.

2 Inst. 621; 1 Roll. Abr. 641, pl. 19; Cro. Ja. 523.

And it seems to have been formerly holden, that the occupier of a corn-mill, besides being liable to the payment of a personal tithe, is also liable to pay, as a predial tithe, the tenth part of his toll.

2 Roll. Rep. 84; Show. 281; Brownl. 32.

It is, however, now settled, by a decree of the House of Lords, upon an appeal from a decree of the Court of Exchequer, that only a personal tithe is due from the occupier of a corn-mill.

1 Eq. Cas. Abr. 366, Newte v. Chamberlain; 1 Br. P. C. 157, S. C.; [2 P. Wms. 463, S. C. cited. Vide Dodson v. Oliver, Bunb. 73.

A mill, it is now clearly settled, is to be considered as a *predial* tithe, so far as respects its locality and the person to whom it is payable; but in the mode of payment it is to be treated as a *personal* tithe. The consequence of its being treated as a *personal* tithe in the mode of payment is, that only a tenth part of the clear profits, after deducting the rent and other incidental expenses, is due for it. Where no conventionary rent is paid for it, as where it is not in lease, in that case an annual value or rent must be set upon it by the officer of the court.

Hall v. Macket, E. 37 G. 3, *in Scacc.;* ‖and see Filewood v. Kemp, *per* Sir W. Scott, 1 Hagg. R. 494. And newly erected mills, for which no tithes have been paid for forty years, are not within the seventh section of 2 & 3 Edw. 6, applying to personal tithes. Newte v. Chamberlayne, Dodd's MS. 204; 1 Bro. P. C. 107; Gwill. 596; 1 Eq. Ca. Ab. 366; 2 Ibid. 731.‖

The occupier of a new-erected mill is liable to the payment of a personal tithe, although the mill be erected upon land discharged of tithes.

Cro. Ja. 429.

It is said in one book, that the occupier of an ancient mill is not liable to the payment of a personal tithe; but that the occupier of a new mill is, by the 9 Ed. 2, st. 1, c. 5, made liable thereto.

Mar. 15, pl. 36.

This seems to be a mistake, for that statute only provides that new-erected mills shall be liable to the payment of tithe; but as nothing is therein said concerning ancient mills, there can be no doubt that such ancient mills, as before the making of that statute were liable to the payment of a personal tithe, continued afterwards to be liable thereto.

12 Mod. 243, Hart v. Hale; 3 Bulstr. 212. ‖*Sed* vide Gwill. Ca. 644, 871, 974, 1022, 130, note (*a*), by which cases it seems settled that for mills, as ancient as the statute *articuli cleri*, 9 Edw. 2, st. 1, c. 5, no tithes are payable.‖

‖Where the owner of an ancient mill, under the same roof, erects two

(C) Of what Things a predial Tithe is due.

new wheels, they are to be considered as two new mills; and, on a bill being brought for the tithe, he cannot cover them with the same modus.

Talbot v. May, 3 Atkins, 17.

And where it appeared that an ancient corn mill had been rebuilt, and two pair of new stones added, Sir William Grant, M. R., decreed an account as to the two pair of new stones, observing that the cases on the subject were not very easily reconcilable.

Manby v. Taylor, 3 Ves. & B. 71; and see 9 Price, 249; Gwill. Ca. 1720; 1 Eagle on Tithe, 390.

Mills used for the purpose of any trade or manufacture are not chargeable with tithe; as fulling mills, paper mills, lead mills, &c., unless by special custom. And no tithe is payable for corn mills where they are used, not for grinding corn of others for hire, but for grinding the miller's own corn, for the purposes of sale in the business of a mealman or baker; and it is the same as to corn ground by a distiller for the purpose of distillation.

Dandridge v. Johnson, 2 Roll. R. 84; Cro. Ja. 523; Wilson v. Mason, Gwill. Ca. 974; 2 Eagle & Y. 240; Browne v. Woolsey, Exch. 1826; 1 Eagle on Tithe, 401.

Accordingly, the tithe owner has no right to a discovery by the miller of the price at which he has sold meal ground by him; but he has a right to have a discovery of the *quantity*.

Chapman v. Pilcher, Wightw. 15; Gwill. 1653.

If the man who has let a ship to a fisherman receive, for the use of his ship, a parcel of the fish which are caught, the fisherman is not liable to the payment of a personal tithe for these fish, because they are no part of his gain.

1 Roll. Abr. 656, N. pl. 2.

‖By 2 & 3 Ed. 6, c. 13, § 11, it is provided, that this act shall not extend to any parish which stands upon and towards the sea coasts, the commodities and occupying whereof consisteth chiefly in fishing, and have, by reason thereof, used to satisfy their tithes by fish; but that all and every such parish and parishes shall hereafter pay their tithes according to the laudable customs, as they have heretofore of ancient time, within these forty years, used and accustomed.

See Eagle on Tithe, ch. 7, § 2.

If a man purchase a house for three hundred pounds, and after sell it for five hundred, no personal tithe is due, for the personal labour bears no proportion in this case to the profit.

1 Roll. Abr. 656, N. pl. 3.

If an innkeeper have such profit out of his kitchen, cellar, and stables, as to make two hundred pounds of what cost him only one hundred, no personal tithe is due, because the profit did not in this case arise from personal labour alone; and so far as it did, it arose perhaps more from the personal labour of servants than from that of the master of the inn.

2 Bulstr. 141, Dolly v. Davis.

(C) Of what Things a predial Tithe is due.

Such tithe as arises immediately from the fruit of the earth, as from corn, hay, hemp, or hops, or from any kind of fruit, seed, or herb, is called a predial tithe.

2 Inst. 649.

(C) Of what Things a predial Tithe is due.

It is so called because it arises immediately from a fruit of the farm or earth.

Inst. 647.

Divers things are by the ecclesiastical law liable to the payment of a predial tithe, which by the common law are not.

4 Mod. 344.

The design under this head is to show what things are liable by the common law to the payment of a predial tithe.

In doing this it will appear that some things, which are in general exempted therefrom, become by custom liable to the payment of a predial tithe.

1 Roll. Abr. 637, E, pl. 2; 1 Roll. Abr. 642, S, pl. 7, 8.

It will also appear that some things, which are in general liable thereto, are under particular circumstances exempted from the payment of predial tithe.

1 Roll. Abr. 645, pl. 11; Cro. Eliz. 475; Freem. 335; 12 Mod. 235.

But wherever any fraud is used to bring a thing under a circumstance, by reason of which it would, if it had come fairly thereunder, have been exempted from the payment of a predial tithe, it is by such fraud rendered liable thereto.

Cro. Eliz. 475; Freem. 335.

As it would be tedious to enumerate all the things which are liable to the payment of a predial tithe, only those shall be mentioned concerning the tithe of which some question has arisen; but from those which shall be mentioned, it may be easily collected of what other things a predial tithe is due.

1. *Of Agistment.*

Agisting, in the strict sense of the word, means depasturing a beast the property of a stranger; but, in its legal sense, it means depasturing the beast of the occupier of the land as well as the beast of a stranger.

ꝑJones Bailm. 91; 1 Bell's Comm. 458; Holt's N. P. Rep. 547; Story, Bailm. § 443; Bouv. L. D. h. v.ꝺ

[Agistment tithe is paid, not for the increase or improvement of the animal agisted, but for the grass eaten by it, and is proportioned to the value of the grass, not to the value of the actual improvement. But, being the tithe of the grass eaten, it arises immediately from the soil, and is therefore a predial tithe.

Scarr v. Trinity College, Anstr. 761; Ellis v. Saul, Ibid. 332; Holbeach v. Whadcock, Hardr. 184; Linw. 194; Degge, 217.

Where, therefore, the occupier of land does not agist his own cattle, but those of strangers, the tithe for the agistment of barren cattle is due from the occupier, as being owner of the grass for which the tithe is paid: but if the cattle are profitable, the owner of them is accountable for the tithes.

Underwood v. Gibbon, Bunb. 3; Fisher v. Leman, 9 Vin. Abr. 38, pl. 7.

Agistment tithe being the tithe of the grass, it follows, that if the grass has before paid tithe of hay, no tithe is due for the agistment of the aftermath.

Ellis v. Saul, *ubi suprà.*] ‖This doctrine is confirmed by the case of Batchelor v.

(C) Of what Things a predial Tithe is due.

Smallcombe, 3 Madd. 12, where all the authorities are reviewed. The reasons for it are not very satisfactory.‖

An occupier of land is not liable to the payment of tithe, for depasturing horses or other beasts used in husbandry in the parish in which they are depastured, because the tithe of other things is by the work of such beasts increased.

1 Roll. Abr. 646, pl. 2, pl. 3, pl. 6, pl. 7; Cro. Eliz. 446; Ld. Raym. 130.

But, if horses or other beasts are used in husbandry out of the parish in which they are depastured, an agistment tithe is due for such beasts.

7 Mod. 114, Harrow's case; Ld. Raym. 130; [Bosworth v. Limbrick, 2 Raym. 809.]

It seems to be the better opinion, that tithe is not due for depasturing a saddle-horse which an occupier of land keeps for himself or servant to ride upon.

1 Roll. Abr. 641, pl. 4; Cro. Ja. 430; Bulstr. 171; Bunb. 3.

But an occupier of land is liable to an agistment tithe for depasturing a horse which he keeps for sale.

Cro. Ja. 430, Hampton v. Wild; 1 Roll. Abr. 647, pl. 14. [Coach horses are liable to the payment of an agistment tithe: Thorpe v. Bendlowes, 3 Burn's E. L. 446.] ‖But it seems that in this case the horses were occasionally used in drawing coals, manure, &c.; otherwise it would be difficult to distinguish the case from that of saddle-horses used for pleasure. See 3 Wood, 38; Gwill. 899; 2 Eag. & Youn. 193; and *quære*, whether such occasional employment for profit would render coach-horses subject to agistment tithe? See Stevens v. Aldridge, 5 Price, 350.‖

[Horses kept on one farm for its cultivation, and used *occasionally* on another farm in a different parish, shall not pay agistment tithe. *Secùs*, if habitually so used.

Filewood v. Button, Anst. 498.] ‖See 5 Price, 350.‖

Tithe is not due for depasturing milch cattle, which are milked in the parish in which they are depastured; because tithe is paid of their milk.

1 Roll. Abr. 646, pl. 2; Cro. Eliz. 446.

If cows are reserved for calving, tithe is not due for depasturing them whilst they are dry; but if they are afterwards sold, or milked in another parish, an agistment tithe is due for the time they were dry.

Hetl. 100.

Tithe is not due from an occupier of land for depasturing young cattle, which are reared to be used in husbandry, or to be milked.

Cro. Eliz. 476, Sherington v. Flewood.

But if such young beasts are sold before they come to such perfection as to be fit for husbandry, or before they give milk, tithe is to be paid for depasturing them.

Hetl. 86, Woolmerston's case.

An occupier of land is liable to tithe for depasturing cattle which he keeps for sale.

Jenk. 281, pl. 6; Cro. Car. 237; Show. P. C. 192.

If cattle, which have neither been used in husbandry nor been milked, are, after having been kept some time, killed to be spent in the family of the occupier of the land on which they were depastured, tithe is not due for depasturing them.

Jenk. 281, pl. 6; Cro. Eliz. 446, 476; Cro. Car. 237.

(C) Of what Things a predial Tithe is due.

It is in general true, that tithe is due for depasturing cattle which are the property of a stranger.

Cro. Eliz. 476; Bunb. 1; Freem. 329.

If an innkeeper put the horse of his guest into a pasture in his own occupation, he is liable to tithe for depasturing the horse.

Hardr. 35, Guilbert v. Eversley; Poph. 142.

Tithe is not due for depasturing any beast upon land which has in the same year paid tithe of hay.

Poph. 142; 2 Roll. Rep. 191. [Vide 3 Burn's E. L. 448, and Bateman v. Aistrup, 2 Raym. 692;] ‖Batchelor v. Smallcombe, 3 Madd. 12; Gwill. 1864; 3 Eag. & Y. 909.‖

Tithe is not due for depasturing any beast upon the headland of a ploughed field, provided the headland be not wider than is sufficient to turn a plough and horses upon.

1 Roll. Abr. 646, pl. 19. [Vide Bateman v. Aistrup, 2 Raym. *contr.*]

Tithe is not due for depasturing cattle upon land which has in the same year paid tithe of corn.

Bro. *Dism.* pl. 18.

If land, which has paid tithe of corn in one year, be left unsown the next year, tithe is not due for depasturing a beast upon the land; because, by its lying fresh, the tithe of the next crop of corn is increased.

1 Roll. Abr. 642, pl. 9.

But if land, which has paid tithe of corn, be suffered to lie fresh longer than by the course of husbandry is usual, tithe is due for depasturing a beast upon the land.

Sheph. Abr. part 4, D. 104.

As the questions, Whether tithe is due for depasturing sheep, and in what cases it is due, do not seem to be settled, it will not be amiss to mention the principal cases in which these questions have been agitated.

It is laid down in one case, that tithe is not due for depasturing sheep, because they are *animalia fructuosa.*

1 Roll. Rep. 63, pl. 7, Mascal v. Price, Mich. 12 Ja. 1.

But in another book of the same author's, where this case is mentioned, there is a *dubitatur.*

1 Roll. Abr. 642 R., pl. 8.

In a case not long after, it was holden, that tithe should be paid for sheep which, after having been depastured in one parish from Michaelmas-day to Lady-day, were removed into another; for otherwise the parson of the first parish may be defrauded of his tithe; for the sheep, which have been carried into a second parish, may not be brought back and sheared in the first.

Poph. 197, Anon., Mich. 2 Car. 1. ‖Where sheep were fed in one parish, and for several years were removed into another just before the shearing and lambing season, and afterwards brought back again, it was held a fraud in equity, and an account was decreed of the number so removed. Hall v. Maltby, Price, 240; Gwill. 1888; 3 Eag. & You. 928.‖

It was, however, said in this case by Whitelock, J., that *de animalibus inutilibus*, as horses, oxen, &c., the parson shall have agistment tithe; but that *de animalibus utilibus*, as cows, sheep, &c., he shall have tithe in kind.

In one case it is said to have been holden, that tithe is not to be paid

for depasturing sheep which are afterwards eaten in the house of the occupier of the land.

Cro. Car. 237, Facey v. Long, Mich. 7 Car. 1.

It would follow as a necessary implication from the doctrine of this case, that tithe is due for depasturing sheep which are not afterwards eaten in the house of the occupier of the land.

But in another report of the same case it is said to have been holden, that tithe is not due for depasturing wethers; because they will yield a tithe of wool.

1 Roll. Abr. 647, pl. 13.

In one modern case in the Court of Exchequer it is said, that it seemed to be admitted, that tithe is due for depasturing yearling sheep.

Bunb. 90, Baker v. Sweet, Mich. 8 G. 1.

In another case shortly after in the same court, it appeared, that sheep, after paying tithe of wool, had been fed upon turnips not severed, by which they were bettered to the value of five shillings each; and that they were then sold. It also appeared, that the defendant had, before the next shearing-time, bought in as many as were sold; and that of these tithe of wool was paid. It was insisted that if an agistment tithe were to be paid for the sheep sold, and tithe of wool for those bought, this would be a double tithing; but the court decreed the defendant to account for an agistment tithe for the sheep sold.

Gilb. Rep. in Eq. 231, Coleman v. Baker, Pasch. 12 G. 1.

In the latter case, the case of Dummer and Wingfield, H. 1 W. & M., was mentioned, in which it had been decreed, that the decree had been affirmed upon a rehearing, that tithe, for depasturing sheep, from the time they were sheared until they were sold, should be accounted for.

In a still later case, the Court of Exchequer were of a quite different opinion. A bill being brought for the tithe of depasturing sheep four months in a parish after they had been shorn, and tithe of their wool had been paid in that parish, it appeared, that at the end of the four months they were removed into another parish, and that they were shorn there at the next shearing-time. In this case, the cases of Coleman and Baker, and of Dummer and Wingfield, were cited by the plaintiff's counsel: but the court decreed, that tithe should not be paid for depasturing sheep; because they are *animalia fructuosa*.

Bunb. 313, Poor v. Seymour, Hil. 5 Geo. 2.

[The doctrine advanced in this case has, however, been overruled in later cases, upon this principle, that the tithe of wool being payable only in the parish where the sheep are shorn, they are not *animalia fructuosa* in the parish wherein they have been only agisted, and therefore shall pay an agistment tithe.

Bateman v. Aistrup, 2 Raym. 658; Howes v. Carter, Anstr. 560. See Ellis v. Saul, 1 Anstr. 332; Gwill. 1326; 2 Eag. & Y. 360; Ellis v. Fermor, Gwill. 1022, 1026.]

‖ Sheep are *primâ facie* considered *animalia fructuosa*, and therefore not subject to agistment tithe; and if the plaintiff seeks to recover such tithes, he must state the special circumstances which entitle him to it.

Turner v. Williams, 3 Anst. 829; Gwill. 1456.

Where a vicar claiming agistment tithe showed that he alone had always taken the other small tithes, he was held entitled to agistment, though

it had never been received or demanded, and although it appeared that the crown, by an ancient grant, had conveyed to certain lay impropriators tithe, not only of grain and hay, but of "herbage;" for "*herbagium*" does not necessarily cover agistment tithe, unless perception be proved.

Byam v. Booth, 2 Price, 231; Scott v. Lawson, 7 Pri. 267, Wood, B., *diss.*‖

2. *Of Corn.*

It is laid down in divers cases, that tithe is not due of the rakings of corn involuntarily scattered.

1 Roll. Abr. 645, pl. 11; Cro. Eliz. 475; Moor, 278; Freem. 335.

But if more corn be fraudulently scattered, than if proper care had been taken would have been scattered, tithe is due of the rakings.

Cro. Eliz. 475; Freem. 335. ‖Vide 2 Wood, 47.‖

It is said by Holt, C. J., that tithe is due of the rakings of all corn, except such as is bound up in sheaves.

12 Mod. 235.

‖When the course of harvesting pursued by a farmer is such that a considerable quantity of barley rakings is necessarily left after the barley is bound into sheaves, the parson is entitled to tithe of these rakings, although no fraud is imputed to the farmer, and though as little rakings are left as is possible in that mode of husbandry.

Glanvill v. Stacey, 6 Barn. & C. 543; and see 1 Hagg. R. 487.‖

[If stubble be used, partly for fodder, and partly for manure, so that the whole of it is consumed in husbandry, it is not subject to the payment of tithe: though it would be otherwise, perhaps, if an unusual quantity of it were left, in order to make a fraudulent profit of it.

Teunnant v. Stubbing, Anstr. 640;] ‖Gwill. 1438; 2 Eag. & Y. 425, S. C.‖

3. *Of Hay.*

Hay is liable to the payment of tithe, notwithstanding beasts of the plough or pail, or sheep are to be fed therewith.

Cro. Ja. 47; Webb v. Warner, 1 Roll. Abr. 650, pl. 12; 12 Mod. 497.

But tithe is not due of hay grown upon the headland of a ploughed field, provided the headland be not wider than is sufficient to turn a plough and horses upon.

1 Roll. Abr. 646, pl. 19.

It is laid down in one case, that if a man cut grass, and while it is in the swathe, carry it, and feed his plough cattle therewith, not having sufficient sustenance for them otherwise, tithe is not due thereof.

1 Roll. Abr. 645; ‖8 Vin. Ab. (Z,) pl. 7, p. 587; Burn's Ecc. L. v. iii, 467;‖ Crawley v. Wells, Mich. 9 Car. 1.

And in a much later case, the Court of Exchequer seemed to be of opinion, that tithe is not due of vetches or clover cut green and given to cattle used in husbandry.

Bunb. 279, Hayes v. Dowse, Hil. 3 G. 2. ‖The question did not arise on the pleadings in this case. See 6 Price, 361, note.‖ [And the law is so clear, that grass newly cut and eaten by agricultural cattle is not titheable, that in a late case, the bill, as to this point, was dismissed with costs. Collier v. Hawse, Anstr. 481.] ‖And see Mantell v. Payne, 4 Gwill. 1511; 3 Eag. & Y. 1380; 6 Price, 362, note. But to exempt such grass, &c., from tithe, it is necessary that there be an insufficiency of other fodder

or sustenance on the farm, and that the cattle fed should be used in husbandry; and both those are questions of fact which it is fit to leave to a jury. Stevens v. Aldridge. 5 Price, 334. And "fodder," and "sustenance" extend to dry food as well as green: so that the grass, &c., given to cattle used in husbandry is not exempted from tithe, if there is sufficient food *of any sort* on the farm. Dorman v. Scars, 6 Price R. 338; Gwill. 1897; and see M'Clel. 113; Gwill. 2055; 13 Price, 394; Eagle on Tithe, v. i. 456.‖

But in a case some years prior to the latter case, it was holden that a right to tithe of hay accrues upon the mowing of the grass; and that the subsequent application thereof, either while it is in grass, or after it is made into hay, shall not, although beasts of the plough or pail are fed therewith, take away the right.

12 Mod. 498, Selby v. Bank, Pasch. 13 W. 3. ‖See Willis v. Stone, 1 Young. & J. 262.‖

And the doctrine of the last case coincides with that of an old case, in which it is laid down, that tares cut green, and given to beasts of the plough, may by special custom be exempted from the payment of tithes: from whence it follows, that such tares are not in the general exempted therefrom.(*a*)

Cro. Car. 393, Mead v. Thurman, Hil. 10 Car. ‖(*a*) Unless in the absence of all other sustenance. See the cases *suprà*, and see Toll. on Tithes, 83; Gwill. 1511.‖

It is laid down in divers books, that tithe is not due of aftermath hay, because tithe can only be due once in the same year from the same land.

2 Inst. 652; Cro. Ja. 42; Ld. Raym. 243.

But it is in other books laid down, that tithe is due of aftermath hay.

Cro. Eliz. 660; Cro. Ja. 116; Cro. Car. 403; 12 Mod. 498; Bunb. 10. Bunbury makes a *quære* as to this point.

And it has been holden in two modern cases, that if divers crops are grown upon the same land in the same year, tithe is to be paid of every crop.

Bunb. 10, Benson v. Watkins, Hil. 3 G. 1; Bunb. 314, Swinfen v. Digby, Hil. 3 G. 2.

‖ It is now settled that tithe of aftermath is due of common right, and that, in order to discharge it, a special custom must be shown; as, for example, that the occupiers had been accustomed to make the first vesture into hay, and to pay the tenth cock thereof, well dried, in satisfaction of tithe of the first vesture and aftermath, which was held a good discharge.

Cro. Eliz. 446; 1 Roll. Abr. 640; Gwill. 531, 473; Cro. Eliz. 660; Moore, 910; Cro. Ja. 116; and see Mirehouse on Tit. p. 40.

As to the mode of tithing hay, see *post*, p. 43.

4. *Of Wood.*

It is said in one case, that, before the constitution of Stratford, wood was only tithable in particular places by custom; because wood does not renew annually.

12 Mod. 111.

By that constitution, which was made in the seventeenth year of the reign of Edward the Third, it was ordained, that tithes should be paid within the province of Canterbury of *sylva cædua*.

2 Inst. 642.

In the next year, the commons complained to the king of that constitu-

tion, as an unprecedented thing; and petitioned, that the people might remain in the same state as they had been under his royal progenitors, and that a prohibition might be granted for all who should be impleaded in court Christian for tithe of wood.

2 Inst. 642.

The answer was, The king willeth that law and reason be done.

2 Inst. 642.

In another petition, presented in the twenty-first year of the same reign, the commons complained to the king, that the clergy, by virtue of the constitution made in the seventeenth year of his reign, demanded tithes both of gross wood and underwood, whether the latter were sold or not.

2 Inst. 642.

To this the king answered, that the archbishop of Canterbury and the other bishops have answered, that tithe is only demanded by virtue of that constitution, of underwood.

5 Inst. 642.

After other petitions had been in vain presented by the commons, the great men of the realm did, in the forty-fifth year of the same reign, join with the commons in a petition.

||Vide these Petitions, Gwill. 4, 5.||

In consequence of this petition, a statute was in the same year made in the following words: "At the complaint of the great men and commons, showing by their petition, that when they sell their gross wood, of the age of twenty or forty years, or of a greater age, to merchants, to their own profit, and to the aid of the king in his wars, the parsons and vicars of holy church do implead, and trouble the said merchants in court Christian, for the tithes of the said wood, under the denomination of *silva cædua*, by reason of which they cannot sell their wood for the real value, to the great damage of themselves and the realm, it is ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as it hath hitherto been."

45 Ed. 3, c. 3.

From these petitions and answers and this statute it appears plainly, that the demand of tithe of wood, by virtue of the constitution made in the seventeenth year of the reign of Edward the Third, was, at least as to gross wood, an encroachment.

2 Inst. 642; 45 Ed. 3, c. 3; Plow. 470; Bro. *Prohib.* pl. 1; Cro. Ja. 100.

After the making of this statute, prohibitions were constantly granted to suits instituted in spiritual courts for tithe of gross wood: but two questions frequently arose; namely, What is gross wood? and of what age gross wood must be, before it is exempted from the payment of tithe?

2 Inst. 643, 644, 645.

For the putting of an end to these questions, it has been long settled, that by gross wood is not meant high or large wood, but such wood as is generally, or by the custom of a particular part of the country, used as timber; and that all such wood, if it be of the age of twenty years, is exempted from the payment of tithe.

2 Inst. 642, 643; Cro. Eliz. 1; 12 Mod. 524.

The wood of oaken, ashen, and elmen trees being universally used as

timber, it has been constantly holden, that such trees, if of the age of twenty years, are gross wood.

2 Inst. 642.

It was holden upon great deliberation, notwithstanding what is laid down to the contrary in Plow. 470, that hornbeam trees, if of the age of twenty years, are gross wood; because the wood of such trees is frequently used in building and repairing.

2 Inst. 643.

It has for the same reason been holden, that an aspen tree, if of the age of twenty years, is gross wood.

2 Inst. 643.

Tithe is in general due of beechen, birchen, hazel, willow, fallow, alder, maple, and white-thorn trees, and of all fruit trees, of what age soever they are; because the wood of these trees is not often used as timber.

Plow. 470; Cro. Eliz. 1; Cro. Ja. 199; 1 Roll. Abr. 640, pl. 5, pl. 6; Brownl. 94.

But if the wood of any of these trees be frequently used, in a particular part of the country where timber is scarce, in building or repairing, tithe is not due of such trees, if they are of the age of twenty years.

Hob. 219; Brownl. 94; ‖Gwill. 357.‖

It is laid down in divers cases, that if a timber tree, after it is of the age of twenty years, decay, so as to be of no use for repairing or building, tithe is not due of the wood of this tree; because it was once privileged.

11 Rep. 48; Cro. Eliz. 477; Cro. Ja. 100; 1 Roll. Abr. 640, pl. 2.

But the contrary is laid down in some other cases.

In two of these it is laid down, that if the wood of a coppice has been usually felled for firing, such wood shall pay tithe, although it stand till it be forty years of age.

Sid. 300; 1 Lev. 189.

In another it is laid down, that if the wood of a timber tree be sold for firing, it is, although the tree be of the age of twenty years, liable to the payment of tithe.

Bunb. 99; ‖1 Wood. 479; 1 Eag. & Yo. 677;‖ Greenway v. The Earl of Kent, Hil. 7 G. I.

The doctrine, however, of the former cited cases has been confirmed in a modern case.

A bill being brought for tithe of the loppings of timber trees, which had been sold for firing, it was insisted that this wood, which would otherwise have been exempted from the payment of tithes, was liable thereto, because it was sold for firing; and some of the cases above cited were relied upon.

MS. Rep., Walton v. Tryon, Mich. 25 G. 2; [Ambl. 130.]

The bill was dismissed; and by Lord Hardwicke, Chancellor.

‖Gwill. 827; 2 Eag. & Yo. 123, S. C.‖

In the cases in 1 Lev. 189, and Sid. 300, the wood in question was coppice wood, which had been usually felled for firing; and consequently these cases do not conclude to the point, because such wood, of what age soever it be, is tithable. What is laid down in the case of Greenaway and the Earl of Kent, is not now law; for in the case of Bybe and Huxley, Hil. 11 Geo. 1,(*a*) which was subsequent thereto, it was agreed that tithe is not due of the wood of a timber tree which has been once privileged from the payment of tithe, although such wood be sold for firing.

‖(*a*) 2 Wood, 237; 1 Eag. & Yo. 805; Gwill. 657.‖

(C) Of what Things a predial Tithe is due.

It is in one book laid down, that the loppings of a timber tree, which are of twenty years' growth, are exempted from the payment of tithe, because loppings of that age may be useful in building.

Plow. 470, Soby v. Molins; ‖1 Eag. & Yo. 60, S. C.‖

But it is laid down in divers other books, that if a timber tree of the age of twenty years be lopped, tithe is not to be paid of the loppings, although they are not of twenty years' growth; for that as the tree is exempted from the payment of tithe, the loppings are likewise exempted.

Bro. *Dism.* pl. 14; 11 Rep. 48; Cro. Eliz. 478; Godb. 175; 1 Roll. Abr. 640, pl. 3.

And the doctrine of the latter cited books was confirmed in the case of Walton and Tryon.

In this case, it appeared that the loppings of the trees, for the tithe of which the bill was brought, were not of twenty years' growth: but it appeared that the trees were of the age of twenty years, before they had ever been lopped. It was decreed by Lord Hardwicke, that tithe was not due of the loppings; for that if a tree be once privileged from paying tithe, the privilege extends to all future loppings, of whatsoever age they are.

[3 Burn's E. L. 452;] ‖2 Eag. & Yo. 123; Gwill. 827.‖

It has been holden, that although a tree was lopped before it was of the age of twenty years, the future loppings of the tree, if they are of twenty years' growth, are not liable to the payment of tithe.

1 Roll. Abr. 640, pl. 1.

But in the case of Walton and Tryon, it was laid down by Lord Hardwicke, that if a tree was lopped before it was of the age of twenty years, all future loppings, of how many years' growth soever they may be, are liable to the payment of tithe.

It has been holden that if a tree, which was privileged from paying tithe, be felled, the germins that spring from the root of the tree are likewise privileged.

11 Rep. 48, Liford's case.

But in the case of Walton and Tryon it was holden, that all germins, which spring from the roots of trees that have been felled, are liable to the payment of tithe.

‖ This decision has been confirmed, (in opposition to the doctrine laid down in 2 Inst. 643,) by recent cases; in one of which the Court of B. R. decided, that young oak wood of more than twenty years' standing, not springing from acorns, but from old stools of felled timber trees of more than twenty years growth, was not exempted from tithe.

Ford v. Racster, 4 Maule & S. 130; Gwill. 1729; and see Chichester v. Sheldon, 1 Turner, 245; 3 Eag. & Yo. 1102; Gwill. 2072, S. C.; Lewis v. Snell, Gwill. 1729; 3 Eag. & Yo. 1388; Evans v. Rowe, 1 M'Clel. & Y. 577. *Sed* vide the N. P. case of Underwood v. Buckle, 1 Eagle on Tithe, 251; and see this subject observed upon at length, 1 Eagle on Tithe, 234, *et seq.*‖

The wood of a coppice, which has usually been felled for firing, is liable to pay tithe, although the same be of the age of forty years.

1 Lev. 189; Sid. 300.

And in the case of Walton and Tryon it was laid down by Lord Hardwicke, that if, when the wood of a coppice is felled, some trees growing therein, which are of the age of twenty years, and have never been lopped, are lopped, and the loppings are promiscuously bound up in faggots with the coppice wood, tithe must be paid of the whole; for that it would be

very difficult to separate the tithable wood from that which is not so, and the owner ought to suffer for his folly, in mixing the latter with the former.

If a tree, or the lopping of a tree, is exempted from the payment of tithe, the bark of the tree or lopping is likewise exempted.

11 Rep. 48, Liford's case; Freem. 334.

The words *silva cædua* are sometimes used as if they signified the same as the word *underwood:* but the former words are of a much larger signification; for under the words *silva cædua* is included every sort of wood, except gross wood of the age of twenty years.

It appears, from what has been already mentioned, that tithe is in general due of *silva cædua.*

If young trees are taken out of a nursery in one parish, and sold to be planted in another parish, tithe is due thereof; else the parson might be deprived of the tithes of his whole parish, by converting the land into nurseries.

1 Roll. Abr. 637, pl. 6; Cro. Car. 526.

And it is in one case laid down, that tithe is due of young trees taken out of a nursery, although they are sold to be planted in the same parish.

Hard. 380, Grant v. Hadding; ‖Gibbs v. Wybourne, Gwill. 501.‖

But, although it be in the general true, that *silva cædua* is liable to the payment of tithes, yet such wood is, under certain circumstances, exempted therefrom.

If *silva cædua* be used in the parish wherein it grew to burn bricks for the repairing or necessary enlarging of the house of a parishioner, tithe is not due thereof.

1 Roll. Abr. 645, pl. 8, pl. 9.

But, if such wood be used to burn bricks for enlarging a house more than is necessary for the family of the parishioner, tithe is due thereof.

2 Roll. Abr. 645, pl. 10.

It is laid down in two cases, that *silva cædua* is exempted from the payment of tithe, when it is burnt in the house of an inhabitant of the parish wherein it grew.

Cro. Eliz. 609, Austin v. Lucas, Pasch. 40 Eliz.; Ellis v. Drake, Pasch. 14 Jac. 1; ‖Gwill. 829. See Willis v. Stone, *infrà.*‖

But in a case, not many years subsequent to these, it is laid down, that such wood is only exempted from the payment of tithe when it is burnt in the house of a parishioner, who occupies land in the parish wherein it grew.

Sid. 447, Tilden v. Waller, Pasch. 22 Car. 1; 1 Ventr. 75.

And from a still later case it may be inferred, that such wood is only exempted from the payment of tithe when it is burnt in the house of an occupier of land in the parish in which it grew, for the necessary use of his family; for it is therein laid down, that if the wood be used for drying hops, of which the parson has no benefit, his tithe of hops having been set out before the hops were dried, tithe must be paid thereof.

Freem. 335, Anon., Mich. 11 W. 3.

If an occupier of land, in a parish where tithe of wood and tithe of corn are both due to the same person, use *silva cædua* for enclosing his

own corn land, which lies in the parish wherein the wood grew, tithe is not due of the wood, because this is used for the preservation of corn whereof tithe is due.

1 Roll. Abr. 644, pl. 2; Ld. Raym. 130.

But, if such wood be used for enclosing the corn-land of another person, tithe is due thereof; notwithstanding the person who is entitled to the tithe of the wood is likewise entitled to the tithe of the corn grown upon the land enclosed.

1 Saund. 143, Croucher v. Collins.

If the tithe of hops and the tithe of wood are both due to the same person, tithe is not due of *silva cædua* used in poling the hops; because the tithe of the hops is increased by the use of the poles.

Freem. 334, Anon.; Bunb. 20.

Tithe is not due of *silva cædua* used in making or repairing carts or ploughs to be used in husbandry in the parish wherein the wood grew; because by the use of the carts and ploughs the tithes of other things are increased.

Goldes, 93, Anon.

‖ But it has lately been decided by Chief Baron Alexander, after reviewing all the authorities, that wood used for hop-poles on the farm, for hurdles for hurdling sheep, for repairing hedges, for land-draining on the farm, and for fuel in the husbandry house, is not exempted by common law from tithe, though it may be exempted by a special custom. A custom in part of a hundred, exempting hedges and hedge-rows less than a rod in width from tithe of wood and underwood, is bad.

Willis v. Stone, 1 Younge & J. 262; Page v. Wilson, 1 Jac. & Walk. 513.‖

5. *Of divers other Things*

It is laid down in one book, that tithe is to be paid of acorns, although the trees upon which they grew would not be liable to the payment of tithe; because the acorns are an annual increase.

11 Rep. 49, Liford's case; ‖1 Eag. & Yo. 152.‖

But in two other books it is laid down, that tithe is not due of acorns, unless they are gathered and sold.

Litt. Rep. 40; Hetl. 27; ‖Gwill. 428, 1554, *acc.*‖

All kinds of flowers and roots, whether they grew in a garden or a field, are liable to the payment of tithes.

Litt. Rep. 148, Stile's case.

Fruit of every kind, although it grow upon a tree in the hedge of a field, is liable to the payment of tithe.

2 Inst. 621; Bunb. 184.

‖ In the case of the Kensington gardeners and nurserymen, it was much debated, whether hothouse plants, as pine-apples, melons, orange trees, and the like, were subject to tithes. The Court of Exchequer decided in favour of the claim, and directed an account. On an appeal to the House of Lords, the appellants urged, in opposition to the claim, that these tithes, if any were due, must be predial tithes, but that predial tithes arose merely and immediately out of the ground; that these plants were exotics; that climate and compost must be procured to keep them in a state of vegetation; that they do not grow in the earth; that the skill and labour of

several years is requisite to bring pine-apples to perfection, which is only attainable by the skilful management of artificial heat; and that if tithes were added to the expense of cultivating these costly exotics, it must put an end to this species of horticulture. On the other hand it was contended, that the arguments drawn from the expense and difficulty, and artificial mode of raising these vegetables would equally prove various tithable productions not to be tithable; and that if exotics were not tithable, the land would scarcely yield any tithable matters, as the greatest part of our vegetable productions are not indigenous. The House of Lords gave no decision on this important point, but reversed the decree of the Court of Exchequer on a collateral point, viz., that the defendants had entered into compositions with their vicar for tithes, which had not been determined by a sufficient notice, and, consequently, they were not liable to a claim for tithes in kind.

Adams v. Waller, 21 Geo. 3; Gwill. 1204.

In a subsequent case, however, the Court of Exchequer have decided against this claim. An impropriate rector filed his bill against nurserymen for tithes in kind of all the produce of their nursery-grounds, including pines, grapes, and exotics produced or perfected in hothouses. The defendants admitted the claim as to the common productions of the nursery-ground, which they had offered to account for; but denied it as to pines and exotics forced in buildings, which they insisted were not tithable. The Court decreed, that so much of the bill as prayed an account of pine-apples, grapes, and exotics raised in hothouses should be dismissed without costs; and that the rest of the bill should be dismissed with costs.

Worral v. Miller, 1801; Toll. on Tithes, 124, n. (*f*).‖

Furze is not liable to the payment of tithe, if it be burnt in the house of a parishioner, who occupies land in the parish wherein it grew.

Litt. Rep. 368, Rooket v. Gomersel. ‖ *Sed* vide Willis v. Stone, *suprà*.‖

But if furze be sold, it is liable to the payment of tithe.

Litt. Rep. 368, Rooket v. Gomersel.

If a man gather green peas to eat in his house, tithe is not due thereof.

1 Roll. Abr. 647, pl. 11.

But if a man gather green peas to sell, or to feed hogs with, they are liable to the payment of tithe.

1 Roll. Abr. 647, pl. 12.

‖ And potatoes and turnips consumed in the family of the owner are not exempted from tithe.

Williamson v. Ld. Lonsdale, 5 Price, 25.‖

In one modern case, it seems to have been the opinion of the court, tnat turnips are only liable to pay tithe when they are drawn.

Bunb. 10, Benson v. Watkins, Hil. 3 G. 1.

But in a more modern case it was holden, that although turnips are not drawn, but are fed off the ground, tithe is due thereof, in case they are eaten by unprofitable cattle.

Bunb. 314, Swinfen v. Digby, Hil. 5 G. 2.

So, it hath been holden, that tithes are due for turnips sown after corn, and eaten by unprofitable cattle.

Crow v. Stoddart, 3 Burn's E. L. 465.

(D) Of what Things a mixed Tithe is due.

Such tithe as arises from a beast, bird, or fowl, is called a mixed tithe
2 Inst. 649; 1 Roll. Abr. 635.

Divers things are by the ecclesiastical law liable to the payment of a mixed tithe, which by the common law are not.
2 Inst. 621; 4 Mod. 344.

The design under this head is to show of what things a mixed tithe is due at common law.

In doing this, it will appear that some things, which are in general exempted therefrom, become by custom liable to the payment of a mixed tithe.
1 Roll. Abr. 635; Copl. 3, 636, pl. 7; Cro. Car. 339; 1 Vent. 5.

It will also appear, that some things, which are in general liable thereto, are under particular circumstances exempted from the payment of a mixed tithe.
1 Roll. Abr. 645, pl. 14, pl. 16.

But wherever any fraud is used to bring a thing under a circumstance, by reason of which it would, if it had come fairly thereunder, have been exempted from the payment of a mixed tithe, it is by such fraud rendered liable thereto.
1 Roll. Abr. 645, pl. 15, 646, pl. 17.

As it would be tedious to enumerate all the things which are liable to the payment of a mixed tithe, only those shall be mentioned concerning the tithe of which some question has arisen: but from those which shall be mentioned it may be easily collected of what other things a mixed tithe is due.

1. *Of the Young of a Beast.*

It is in general true, that tithe is due of the young of a beast which is not *ferœ naturœ*.

But tithe is not due of the young of a hound, an ape, or of any beast which is kept only for pleasure.
Bro. *Dism.* pl. 20.

Tithe is not due of the young of a deer; for a deer is *ferœ naturœ*.
2 Inst. 651.

And for the same reason, tithe is not due of the young of a coney.
1 Roll. Abr. 635, C. pl. 3; Cro. Car. 339; 1 Ventr. 5.

2. *Of the Eggs and Young of a Bird or Fowl.*

It is in general true, that tithe is due of the young of a bird or fowl which is not *ferœ naturœ*, unless the eggs of the bird or fowl have before paid tithe.
1 Roll. Abr. 642, pl. 6; 2 P. Wms. 463.

But tithe is not due of the eggs or young of a bird or fowl which is kept only for pleasure.
Bro. *Dism.* pl. 20.

Tithe is not due of the eggs or young of a partridge or pheasant; because these are *ferœ naturœ*.
Moor, 599; 2 P. Wms. 463.

If a man keep pheasants, whose wings are clipped, in an enclosed wood,

and from their eggs hatch and bring up young pheasants, tithe is not due of the young pheasants, although none were paid of the eggs; because the old pheasants are not reclaimed, and would go out of the enclosure if their wings were not clipped.

Roll. Abr. 636, pl. 5.

It was heretofore holden, that neither the eggs nor young of a turkey are liable to the payment of tithe; because turkeys are *feræ naturæ*.

Moor, 599, Hugton v. Price.

But it was holden in a modern case, that, as turkeys are at this day as tame as hens or any other poultry, tithe is due of the eggs or young of a turkey.

2 P. Wms. 463, Carleton v. Brightwell.

Tithe is not due of young pigeons, in case they are spent in the house of the occupier of land who breeds them.

1 Roll. Abr. 644, Z, pl. 4, pl. 6; 1 Ventr. 5; 2 Mod. 77; 12 Mod. 47.

But if young pigeons are sold, tithe is due thereof.

1 Roll. Abr. 644, Z, pl. 5, pl. 6.

‖ Tithe is not due of the eggs or young of ducks in a decoy, nor for the eggs of tame ducks kept for the service of a decoy.

Gwill. 531.‖

3. *Of Wool.*

If a man pay the tenth lamb as tithe at Mark-tide, and at Midsummer shear the other nine lambs, tithe is due of the wool; for although there were only two months between the time of paying the tithe lambs, which were not shorn, and the shearing of the residue, there is a new increase.

1 Roll. Abr. 642, R, pl. 7; Bunb. 90.

If a man shear his sheep about their necks at Michaelmas, to preserve their fleeces from the brambles, tithe is not due of the wool; for it appears that this, it being done before their wool is much grown, could not be done for the sake of the wool.

1 Roll. Abr. 645, pl. 16.

If a man, after their wool is much grown, shear his sheep about their necks, in order to preserve them from vermin, tithe is not due of the wool.

1 Roll. Abr. 645, pl. 16.

If a man, a little before shearing-time, cut dirty locks of wool from his sheep, in order to preserve them from vermin, tithe is not due of the wool.

1 Roll. Abr. 645, pl. 17.

But if, in either case, more wool than ought to have been cut off be fraudulently cut off, tithe is due of the wool.

1 Roll. Abr. 645, pl. 15, 646, pl. 17.

‖ If sheep are removed a short time before shearing-time from the parish where they are fed into another parish, for the purpose of defrauding the tithe-owner of his tithe, equity will make him account for such tithe; but the fraud must be positively alleged, and clearly proved.

1 Wood, 469; 3 Wood, 108; Hall v. Maltby, 6 Price, 240.‖

It is laid down in one case, that tithe is not due of the wool of a

sheep killed to be spent in the house, or of the wool of a sheep which dies of itself.

Lit. Rep. 31, Civil v. Scott, Pasch. 3 Car. 1.

But in another case, a few years after, it is laid down, that tithe is due of the wool of a sheep killed to be spent in the house.

1 Roll. Abr. 646, pl. 18; Dent v. Salvin, Pasch. 14 Car. 1.

[Tithe of the wool of lambs is due, though the parson may have received the tithe of the lambs in their wool.

Carthew v. Edwards, 3 Burn's E. L. 474.]

4. *Of divers other Things.*

Fish taken out of a pond, or an enclosed river, are liable to the payment of tithe.

[This is by no means clear.]

But no tithe is due of fish taken out of the sea, or an open river, although they are taken by a person having a several fishery; because fish are *ferœ naturœ.*

Noy, 108; 1 Roll. Abr. 636, pl. 4, pl. 6, pl. 7; Cro. Car. 339; 1 Lev. 179; Sid. 278; ‖and see 1 Wood, 523; 2 Wood, 283.‖

Honey and bees' wax are liable to the payment of tithe.

Fitz. N. B. 51; 1 Roll. Abr. 635, C, pl. 1; Cro. Car. 559. ‖Godolphin ranks these among predial tithes. Rep. Can. 389.‖

But wherever tithe of the honey and wax of bees has been paid, no tithe is due of the bees; ‖ for they are *ferœ naturœ.*‖

Cro. Car. 404, Anon.

Tithe is not due of the milk spent in the house of a farmer, in case the house stands in the parish wherein the cows are milked.

Ld. Raym. 129, Scole v. Lowther.

‖ A claim for tithe of mortuaries was made in a late case; but it was not decided on.

2 Price, 295.‖

(E) To whom Tithe is in general to be paid.

It is laid down in divers books, that only spiritual persons were at the common law capable of receiving tithes; because tithes are an ecclesiastical inheritance.

2 Rep. 45; 11 Rep. 13; Cro. Eliz. 293, 599, 763; Hob. 296.

As a layman had not before the 32 H. 8, c. 7, any remedy in the case of subtraction of tithe, it follows that a layman was not at the common law capable of acquiring a right to tithe; for wherever there is a right, there must be a remedy for the recovery thereof.

2 Rep. 44; 2 Inst. 648; Cro. Eliz. 512.

The king was, indeed, at the common law capable of receiving tithes, because he is *persona mixta;* but he could only receive them in his spiritual capacity, and not as belonging to a manor.

Cro. Eliz. 293, 599, 763; 2 Rep. 44.

It is laid down, that the king's grantee, although a layman, was at the common law capable, by virtue of the king's prerogative, of receiving tithe.

2 Rep. 44. Bishop of Winchester's case.

(F) To whom Parochial Tithes are to be paid.

But it seems to be the better opinion, that as the king himself is only capable of receiving tithe in his spiritual capacity, and not by virtue of his prerogative, the capacity of receiving tithe, being personal, cannot be conveyed to a layman.

2 Roll. Abr. 655, J, pl. 2; Hardr. 315.

A layman could at the common law have prescribed, that in consideration of an annual sum of money to be paid to the parson, for all tithes arising within a manor, he was entitled to the tenths of all corn growing in the manor.

Cro. Eliz. 599, 763; Bro. *Dism.* pl. 1, pl. 5; 2 Rep. 44.

At this day a layman is capable of receiving tithes; for the tithes belonging to many churches, and some portion of tithes, which upon dissolution of monasteries were by divers statutes vested in the crown, are become lay-fees, and have all the properties of temporal inheritances.

1 Inst. 159; 11 Rep. 13; Fin. Rep. 309.

(F) To whom Parochial Tithes are to be paid.

BEFORE the decretal epistle of Pope Innocent the Third, which was written about the year 1200, and which, from its being dated at Lateran, has been often mistaken for a decree of the council of Lateran, holden not many years before, parochial tithes were not appropriated to any spiritual person in particular; but it was in the power of every person to pay tithes to such spiritual person or corporation as he pleased.

2 Inst. 641, 653; Bro. *Dism.* pl. 21; Hob. 296.

By that epistle, which laments the inconveniencies arising from this power, it was directed, that, for the time to come, the tithes of all parishes should be paid to the persons having the cure of souls in the respective parishes, who were called rectors.

2 Inst. 641.

That epistle, which would not have been in itself obligatory, being founded in reason and justice, was well received, and soon became part of the law of the land; and in consequence thereof rectors became entitled to all the tithes, except portions of tithes, arising in their respective parishes.

2 Inst. 641.

As many advowsons had, before that decretal epistle was written, been granted to divers religious persons, as to abbots, priors, single deans, and single prebendaries, and their successors, the practice of collating themselves to the churches thereto belonging, and of undertaking personally the cure of souls, was, for the sake of keeping the tithes in their own hands, soon after introduced. As this practice was followed by their successors, the tithes of many parishes were kept perpetually in their own hands. In process of time, in order to avoid a multiplicity of institutions and inductions, such persons obtained licenses, that they and their successors might be perpetual incumbents of the churches.

Spelm. Eng. Works, 137.

In this way appropriation to churches began; but churches were at that time only appropriated to such single spiritual persons as did in person administer the sacraments and perform other divine service.

Spelm. Eng. Works, 138.

Deans and chapters afterwards obtained licenses for the appropriation

of churches belonging to their advowsons; but as they, being a body corporate, could not jointly do the duty of a parish priest, and as no one in particular was bound to do it, a deputy, called a vicar, was appointed under their common seal to do that duty: but the person so appointed was usually a member of the spiritual corporation to which the church was appropriated.

Spelm. Eng. Works, 138.

The practice of appointing vicars being once introduced, prioresses and nuns obtained the like licenses for the appropriation of the churches belonging to their advowsons; and they likewise appointed vicars, and took the profits of the advowsons to themselves.

Spelm. Eng. Works, 138.

Encouraged by these examples, the abbots, priors, single deans, and single prebends, who had before performed divine service in person, likewise appointed vicars.

Spelm. Eng. Works, 138.

It seems probable that vicars were not at first endowed with any part of the tithes belonging to their respective churches, but received a certain yearly sum of money, by way of a salary; and it appears that the sum received by some vicars was very small.

For by the 15 R. 2, c. 6, after reciting that divers damages and hinderances have happened, and daily do happen, to the parishioners of divers places by the appropriation of the benefices of such places, it is agreed and assented, "That in every license, from henceforth to be made in the Chancery, of the appropriation of any parish church, it shall be expressly contained and comprised, that the diocesan of the place upon the appropriation of such churches shall ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that shall have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed."

Afterwards, by the 4 H. 4, c. 12, it is ordained, "That from henceforth in every church appropriated, or to be appropriated, a secular person be ordained perpetual vicar, canonically instituted and inducted to the same, and conveniently endowed by the discretion of the ordinary, to do divine service, to inform the people, and to keep hospitality there; and that no religious person be in any wise made vicar in any church appropriated, or to be appropriated, for the time to come."

As it is only provided by the 4 H. 4, c. 12, that vicars shall be endowed at the discretion of the ordinary, it has of course happened, that the right of a vicar to tithes is very different in different parishes.

In divers parishes, the vicars are only endowed with some particular tithes arising in their respective parishes.

Cro. Eliz. 462; 2 Roll. Abr. 335, pl. 6.

In other parishes, the vicars are endowed with all tithes arising in their respective parishes, except such as are reserved in the deeds of endowment.

2 Roll. Abr. 335, pl. 1, pl. 4.

In other parishes, the vicars are endowed with all small tithes arising in their respective parishes.

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It follows, that as the right of a vicar to tithes always depends upon the endowment of his vicarage, he ought, whenever his right is questioned, to show himself entitled by endowment to the tithe he claims.

Cro. Eliz. 633 ; 2 Bulst. 27 ; Bunb. 7, 72, 169.

But, although a vicar cannot produce the deed of endowment if he can show that he and his predecessors have constantly received the tithe by him claimed, this is evidence that he has a right by endowment to tithe.

2 Keb. 729 ; Bunb. 7, 169.

‖In questions between the rector and vicar, the *onus* of proving his right to tithe falls on the vicar ; and he must show either an endowment, or prescription which raises a presumption of one. But when the vicar produces his endowment, then the *primâ facie* title to the extent of the endowment is in favour of the vicar ; and if the rector would claim any article of tithes within it, the *onus probandi* is thrown on him, and he must make out his case by strict proof. He must give such evidence as will raise a presumption that the parties had come to some fresh agreement, that some different arrangement as to the distribution of the tithes had been made, between the date of the endowment and the disabling statutes 13 Eliz. c. 10, and 13 Eliz. c. 20.

Awdry v. Smallcomb, Gwill. 1528 ; and see Dorman v. Curry, 4 Price, 109, and Gwill. 1168; Williamson v. Lonsdale, Dan. 171 ; Gwill. 1860, Williamson v. Thompson, 9 Price, 186.

And where the plaintiff, a lay impropriator, and his ancestors had had uninterrupted enjoyment of the tithe of hay, and there was no evidence of any perception of it or composition for it by the vicar, but an endowment of the vicarage with this tithe was shown in 1253 ; the court held, that it might be presumed, in favour of this modern enjoyment, that the tithe had been conveyed into lay hands prior to the disabling statutes.

Lady Dartmouth v. Roberts, 16 East, 334 ; and see 4 Price, 355.‖

In many deeds of endowment of vicarages a power is reserved to the archbishop to increase the tithes of the respective vicarages ; and if such power be not reserved, an augmentation of the tithes may be made with the consent of or upon citing all parties, but not without notice or citation.

Hardr. 329, Twisse v. Blunt.

In consequence of this it has been holden, that if a vicar and his predecessors have for a long time received a tithe which they were not entitled to under the deed of endowment, this, although the deed of augmentation be not produced, is evidence that the vicarage has at some time been augmented with the tithe.

Hardr. 329, Twisse v. Blunt.

‖And a particular and minute enumeration of several articles in the endowment does not exclude the vicar's right to other small tithes not mentioned in it.

Manby v. Curtis, 2 Price, 285.

And in a case where the endowment did not express "small tithes," but the vicar had been in constant perception of all small tithes, except agistment (which was a tithe not formerly paid in the north, where the living was situate,) and turnips and potatoes, (which were not grown in this country at the time of the endowment ;) it appearing that the impropriate rectors had never claimed more than tithe of corn and grain, and

that there was a pension payable to the impropriators out of the vicarage, the court decreed, in favour of the vicar, an account of the tithe of agistment, turnips, and potatoes. Gibbs, C. B., in delivering judgment, observed, that where it appears that the vicar has uniformly received all the small tithes, there can be no difficulty in his making out his claim. But that the cases have gone further, deciding that where a title is made out by the vicar to all small tithes, he is entitled to whatever tithes are legally of that description, although not before paid; and where tithes of modern introduction or other small tithes have not been received, it will be presumed it was because no occasion occurred: that it had been again and again determined, that tithes of modern introduction are vicarial tithes: that if a vicar is found receiving small tithes, and no one else receiving any portion of the small tithes, it is to be presumed he is endowed of all; and that further, where the rector has received some small tithes and the vicar all the others, it has been holden that a mistake may account for the rector's receipt.

Kennicott v. Watson, 2 Price, 250, n.; and see Byam v. Booth, 2 Price, 231; Cunliffe v. Taylor, Ibid. 329; Williams v. Price, 4 Price, 156; Scott v. Lawson, 7 Price, 267; Leathes v. Newitt, 4 Price, 374.

And proof of immemorial perception by the vicar of a particular tithe will establish his right to it, when the rector shows no perception on his part, even although the vicar's endowment actually states this species of tithe to belong to the rector; for in such case a subsequent endowment may be presumed.

Parsons v. Bellamy, 4 Price, 190.

Where the plaintiff, as lessee of the impropriate rectory of Bedfont, which had been granted by Queen Elizabeth under the words, "*omnes decimas nostras garbarum et granorum*," claimed tithe of seed-tares in a suit against a parishioner, and the vicar; and it appeared that the grantees had always received this tithe, and that the vicar had received all small tithes, and also the tithes of tares cut green and of hay, and no endowment was produced, the court held, that every thing that was vested in the crown passed to the grantees under the grant of Elizabeth, and that they were entitled to the tithe claimed as a tithe, "*garbarum*." They also considered the tithe as a great tithe: but whether it were great or small, the vicar could not be entitled to it, since he had never received it; and his endowment, which was presumed from perception, must also be limited by it.

Daws v. Benn, 1 Barn. & C. 751; 3 Dow. & R. 122; Gwill. 2061, S. C.‖

Upon the dissolution of monasteries, the tithes of all churches appropriated to the monasteries, and all portions of tithes belonging to them, were by divers statutes vested in the crown.

11 Rep. 13; Hob. 308.

Much the greater part of these tithes have been since granted in fee by the crown.

All tithes so granted, except such as have been since given to the respective churches, are to this day due to the grantees of the crown, who are called impropriators.

It is in general true, that a chaplain or a curate is not entitled to tithe.

[That a curate may hold tithes, was determined in the Exchequer in 1790, in Tamberlaine v. Humphreys.] ‖Gwill. 1345; *sed* vide Bunb. 273.‖

A suit being brought for tithes by a chaplain to a chapel of ease, which

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was neither presentative nor donative, it was holden, that he was not entitled to any tithe.

Lit. Rep. 72, Anon

It was insisted, that by the custom of the parish, the curate, after being appointed by the rector, was entitled to divers kinds of tithes; but it was holden that these could not be due to him, because the rector might remove him at pleasure.

Noy, 15, Bott v. Brabalon; Bunb. 273, Price v. Pratt. ‖Gwill. 677; 2 Eag. & Youn. 6.‖

A bill being brought by a perpetual curate for the recovery of divers small tithes, it appeared that the chapel of which he was curate was annexed to the church of Hemels Hempstead; that he was nominated thereto for life, by the vicar of Hemels Hempstead, who, in the instrument of nomination, had given him the small tithes of the chapelry, with a power to sue him for the same in the vicar's name; and that he was licensed by the bishop. It was holden that the plaintiff had no right to the tithes, because he had not a permanent interest in them; for that an appointment to a curacy, although expressly made for life, is revocable by the common law, without any cause being shown; and by the ecclesiastical law, upon good cause being shown.

But a curate, who comes in by institution from the ordinary, may be entitled to tithes.

An impropriator gave the tithes of a parish, all which belonged to his rectory, by will to the maintenance of the minister of the parish for ever; but did not give either the tithes, or the power of nominating the minister, to any person. This devise being void in law, because it was to no certain person, the heir at law nominated A to be the minister. Afterwards, upon the supposition of a lapse to the crown, B was presented, instituted, and inducted. A question, to whom the tithes of the parish belonged, coming before a court of equity, it was decreed, that as B came in by institution from the ordinary, although he was not, strictly speaking, either rector or vicar, they were due to him.

2 Ch. Ca. 19, 31, Perne v. Oldfield.

Personal tithes are to be paid in the parish wherein the person who is to pay them lives.

Sheph. Abr. 1013.

If cattle for which an agistment tithe is due have been sometimes depastured in one parish, and at other times in another, tithe must be paid in each parish, in proportion to the time they were therein depastured.

Bro. *Dism.* pl. 16.

By the 2 Ed. 6, c. 13, § 3, it is enacted, "That every person which shall have any beasts, or other tithable cattle, going, feeding, or depasturing in any waste or common, whereof the parish is not certainly known, shall pay tithes for the increase of the said cattle to the parson, vicar, proprietor, portionary, owner, or other their farmers or deputies of the said parish, hamlet, town, or other place, where the owner of the said cattle dwelleth."

‖ This clause does not extend to agistment tithe. Ellis v. Saul, 1 Anst. 332; Gwill. 1326; 2 Eag. & Youn. 366; *sed* vide Ellis v. Fermor, Gwill. 1022; 3 Eag. & Youn. 1244.‖

The tithe of lambs is to be paid in the parish wherein the sheep yean, although the sheep have been fed in two or more parishes.

Bunb. 139, Boys v. Ellis; 12 Mod. 497.

(H) Of the Right to a portion of Tithes in a Parish.

||But if the sheep are fraudulently removed just before the lambing season, to avoid tithe, equity will make the owner account to the parson of the parish whence they are removed for the tithe.

1 Wood. 469; 3 Wood, 108; Hall v. Maltby, 6 Price, 240; Gwill. 1888; 3 Eag. & Youn. 928.||

No predial tithe, which would, if the corn or other thing from which it arises had been severed before the death of the rector or vicar of the parish, have been due to the rector or vicar, is due to the executor of the rector or vicar; but the person who succeeds to the benefice is entitled thereto.

1 Roll. Abr. 655, pl. 3; 2 Bulstr. 184.

(G) To whom extra-parochial Tithes are to be paid.

ALL tithes, arising in an extra-parochial place, are, by the canon law, to be paid to the bishop of the diocese in which the place lies.

2 Inst. 647.

But by the common law all such tithes are to be paid to the king.

Bro. *Dism.* pl. 10; 2 Inst. 647; 2 Roll. Abr. 657, pl. 2, pl. 5.

As the appropriation of tithes, in consequence of the decretal epistle of Pope Innocent the Third, extended only to parochial tithes, all the tithes of extra-parochial places continued to be due to the king.

Antè, p. 27; Cro. Eliz. 512.

And consequently, all extra-parochial tithes, of which no grant has been made, are at this day due to the king.

||And this right is not confined to such extra-parochial lands as were formerly forest lands.

Attorney-General v. Lord Eardley, 8 Price, 39; Gwill. 1943; 3 Eag. & Youn. 986.||

(H) Of the Right to a Portion of Tithes in a Parish.

BEFORE the tithes of parishes were, in consequence of the decretal epistle of Pope Innocent the Third, appropriated to the persons having cure of souls in the respective parishes, it was a common practice to grant the tithes of a whole manor, or of a particular farm, to any spiritual person, or to any spiritual corporation, and to his and their successors.

Antè, p. 27; 2 Inst. 641; Bunb. 190.

A stop was, by the appropriation of parochial tithes, put to this practice; but as the right to tithes, which had been before thus granted, continued in the spiritual person or corporation, and in his and their successors, (the) tithes thus granted, in order to distinguish them from the other tithes of the parish, have been always called portions of tithes.

Some portions of tithes do, at this day, continue in the hands of the successor to the spiritual person or corporation to whom they were at first granted.

Others, which came to the crown upon the dissolution of monasteries, are at this day in the hands of the king, or the grantees of the crown.

Hence it frequently happens, that a spiritual person has a right to a portion of tithes, in a parish of which he is neither rector nor vicar; and that an impropriator has a right to a portion of tithes in a parish of which he is not impropriator.

2 Inst. 641, 642, 653.

||In questions between a rector and portionist, touching the extent of their respective rights, the rector is entitled to stand upon his common law

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right to all tithes, and to throw the *onus probandi* on the portionist of showing an exclusive right to a certain portion of them. But if there has been no perception on the part of the rector, then he is not in condition to throw the *onus probandi* on the portionist: and if the portionist clearly shows that he is entitled, under grants from the crown of possessions of a dissolved monastery, to some of the great tithes of the rectory, but cannot show to what specific portion; and the rector, on the other hand, has had no perception, and cannot show what portion of the tithes belonged to the rectory, and what to the monastery, the court has no means of assisting either party to avail himself of his title. And in such case, the court can only retain the rector's bill to give him an opportunity of taking an issue, or proceeding by commission, ejectment, or action on the statute.

Ferrars v. Pellat, Gwill. 1602; 4 Wood, 334, S. C.; Boulton v. Richards, 9 Price 671; 3 Eag. & You. 1068.‖

(I) By whom Tithe is to be paid.

It has been holden, that the owner of the cattle is liable to pay the tithe due for depasturing them.

Hard. 184, Pory v. Wright, Pasch. 13 Car. 2.

But in a modern case in the Court of Exchequer, it was holden, that only the occupier of the land is liable to pay tithe for depasturing cattle, although the cattle are the property of a stranger.

Bunb., 3 Underwood v. Gibson, Hil. 2 G. 1. [*Suprà.*]

And in a note at the bottom of the latter case it is said to have been settled, in the case of Fisher and Leman, Mich. 7 G. 1, that in general, only the occupier of the land is liable to an agistment tithe; but that in the case of a common the owner of the cattle is liable thereto, because the owner of the soil has no profit from depasturing the cattle.

It is laid down in one case, that the person who buys corn of the grower is not liable to pay the tithe thereof, because he may not be known to the parson.

Noy, 150, Baker's case, Trin. 44 Eliz.

But it is in another case laid down, that the vendee of standing corn is liable to pay the tithe thereof.

Cro. Ja. 362, Moyle v. Ewer, Mich. 10 Jac. 1.

And the latter seems to be the better opinion: for in two other cases it is laid down, that the vendor, who, after selling his corn, had severed it by order of the vendee, should pay tithe thereof, because it was sold in a secret manner.

Brown, 34; Hele v. Fretenden, 2 Bulstr. 184.

From whence it may be fairly inferred, that if the corn had been sold in an open manner, the vendee would have been liable to pay tithe thereof.

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As the vicars are in many parishes endowed with all small tithes, questions frequently arise, whether the tithes of certain things are small tithes.

But such questions can only arise concerning things of which a predial tithe is due; for it is universally agreed, that every personal and every mixed tithe is a small tithe.

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It was the opinion of Holt, Chief Justice, that in order to distinguish whether the tithe of a particular thing be a great or small tithe, regard must be had to the place where the thing from which it arises grows; for that if corn grow in a garden, the tithe thereof is a small tithe; and *vice versâ*, that if a thing, the tithe of which is in general a small tithe, grow in a field, the tithe thereof is a great tithe.

12 Mod. 41; Wharton v. Lisle, 3 Lev. 365; Skin. 341.

But it was holden by the opinion of the other Justices, Eyre, Dolben, and Gregory, that the nature of the thing from which the tithe arises is only to be considered; and that the tithe of corn, although grown in a garden, would, agreeably to what is laid down in Moor, 909, be a great tithe.

It was, however, said in this case by Dolben and Gregory, that if a thing, the tithe of which is in general a small tithe, should be grown in the greater part of a parish, the tithe thereof would, agreeably to what is laid down in Hut. 78, be a great tithe.

But Eyre was of a different opinion as to this point.

The opinion of Holt, Chief Justice, was contrary to what is laid down in divers books; and the opinion of the three justices has been adhered to in two modern cases.

It is in divers books laid down, that the tithe of saffron is a small one, although a field of forty acres be planted therewith.

Cro. Eliz. 467; Bedingfield v. Feak, Hut. 78; Moor, 909.

In one of the modern cases the question was, whether the tithe of potatoes, planted in fields in a parish to the amount of three hundred acres, is a small tithe? It was holden to be so. And by Lord Hardwicke, Chancellor—It seems to me, that in the case of Wharton and Lisle, Holt, Chief Justice, did ultimately acquiesce in the opinion of the other three judges; for if he had not, the judgment would scarcely, as was done, have been given in his absence, and upon the first argument. The distinction betwixt a great and small tithe was at first founded upon the quantity of the thing from which it arose. Thus, the tithes of corn, and some other things, were called great tithes, because these things usually grew in large quantities. On the other hand, the tithes of flax, and some other things, which generally grew in small quantities, were called small tithes. Whenever the cultivation of a new thing has been introduced, the method has been to denominate the tithe thereof great or small, from its similitude to other things, the tithes of which are great or small; but it would be productive of great uncertainty to hold, that a tithe, which has once obtained the denomination of great or small, should be liable to a new denomination from the quantity of the thing from which it arises, or from the place where it grows. It has been said, that if neither the quantity of the thing, nor the place in which it grows, ought to be regarded, the value of great tithes may, by growing only those things in a parish which are liable to the payment of small tithes, be reduced to almost nothing. This is very true, and it is an inconvenience; but it is one which must be submitted to by all who have estates in tithes, because it arises from the transitory and fluctuating nature of such estates.

MS. Rep. Smith v. Wyatt, Trin. 16 G. 2; 2 Atk. 365, S. C.

In the other modern case, it was laid down by Lord Henley, Keeper,

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that the difference betwixt a great and small tithe depends entirely upon the nature of the thing from which it arises.

MS. Rep. Sims v. Barnett, Mich. 1 G. 3.

It is said to have been ruled at an assize, that the tithe of clover seed is a great tithe, because clover seed is a species of grain.

Skin. 341.

But it has been decreed by the Court of Exchequer, that the tithe of clover seed is a small tithe.

Bunb. 344.

It has been holden, that the tithe of flax is a small tithe.

1 Roll. Abr. 643, pl. 11; 12 Mod. 41; 3 Lev. 365.

The tithe of hay is not a small tithe, but vicars are in many parishes entitled thereto by endowment.

Skin. 341; 3 Keb. 419; Bunb. 79, 344.

And if a vicar be entitled by endowment to the tithe of hay made of grass, he is likewise entitled to the tithe of hay made of clover, saintfoin, or any other thing of the like kind, although the cultivation of the thing has been introduced since the endowment of his vicarage; because every one of these things is a species of grass.

Hut. 78; Skin. 341; 3 Keb. 419; Bunb. 79, 344.

The tithe of hops has been holden to be a small tithe.

Sid. 443, Crouch v. Risden, Bunb. 79.

The tithes of peas and beans are in general great tithes; and if a vicar be entitled to the tithe of either of these, it is by endowment.

A bill being brought for the tithes of peas and beans, sowed and set in rows, drilled, hoed, and hand-weeded in a garden-like manner, as being small tithes; the defendant insisted, that peas and beans, cultivated in this manner, had usually been grown in a great part of the parish; and that tithes thereof had never been paid to the vicar. It was decreed, without going into the consideration of the quantity grown in the parish, that as no endowment of these tithes was produced, nor any receipt of them by the vicars proved, the bill should be dismissed.

Bunb. 170, Gumley v. Birt.

In a very late case a bill was brought for the tithes of peas and beans, grown in fields, gathered by hand while green, and sold in markets. It was said for the plaintiff, that, although the tithes of the peas and beans would if they had stood till they were ripe have been great tithes, by gathering the peas and beans before they were ripe, and by hand, they became small tithes. The decree was, that the tithe was a great tithe. And by Lord Henley, Keeper,—The difference betwixt a great and small tithe depends entirely upon the nature of the thing from which it arises. It would be strange to hold, that the gathering of a thing at one time should make the tithe thereof a small tithe, which would, if the thing had been gathered at another time, have been a great tithe; it has been expressly determined in the case of Hodgson v. Smith, Bunb. 279, that the tithe of tares, whether cut green or ripe, is a great tithe. It was holden in the case of Gumley v. Birt, Bunb. 170, that the mode of cultivating land for the growing of peas or beans did not make the tithe thereof a small tithe; and there is surely less reason to hold, that the mode of gathering peas or beans should make the tithe thereof a small tithe.

MS. Rep. Sims v. Barnett, Mich. 1 G. 3.

(L) How far Custom regarded in setting out Tithes.

If a vicar be entitled by endowment to the tithe of peas and beans, he is entitled to such tithe, in what way soever the land upon which they grow is cultivated.

A bill being brought for the tithes of peas and beans, the defendant insisted, that the vicar was only entitled to the tithes of peas and beans grown in fields when the ground had been turned with a spade; but it was decreed by the Court of Exchequer, that he was also entitled to the tithes of peas and beans grown in fields when the ground had been turned with a plough; and the decree was affirmed in the House of Lords.

Bunb. 19, Nicholas v. Elliot; 2 Br. P. C. 31, S. C., under the name of Husten v. Nicholas.

‖It is decided, that the tithe of seed tares is a great tithe.

Daws v. Benn, 1 Barn. & C. 751; 3 Dow. & Ry. 122; Gwill. 2061.‖

It has been decreed, that the tithe of potatoes is a small tithe.

MS. Rep. Smith v. Wyat, Trin. 16 G. 2; 2 Atk. 365, S. C.; ‖Gwill. 777; Sims v. Bennett, Gwill. 874; 2 Eag. & Youn. 172.‖

The tithe of saffron has been holden to be a small tithe.

Cro. Eliz. 467, Bedingfield v. Feak, Hut. 78.

It has been holden, that the tithe of wood is a small tithe.

Cro. Car. 28, Udall v. Tindall, Sid. 447.

The tithe of wood is in general a great tithe, but in some parishes it is a small tithe.

1 Roll. Abr. 643, U, pl. 2.

‖Tithe of cole seed is a small tithe.

Gwill. 533. *Sed* vide 1 Wood, 45, 528.

So is tithe of teazel, a plant used by clothiers.

Gwill. 564, 565, n.

So also is tithe of woad.

Degge, p. 2, c. 1; Gwill. 428.

It does not seem settled whether tares, clover, artificial grasses, and the like articles, cut and used as green fodder, are in the nature of hay and a great tithe, or in the nature of agistment and a small tithe.

See Lewis v. Young, M'Clelland, 113; 3 Eag. & Youn. 1135; Lagden v. Flack, 2 Hagg. R. 303; 3 Eag. & Y. 973; Gwill. 1927.

(L) How far the Custom of a Parish is to be regarded in the setting out of Tithes.

It is by divers statutes provided, that tithes shall be paid according to the usages and customs (*a*) of the respective parishes in which they arise.

‖(*a*) The custom must be immemorial. See Knight v. Halsey, 2 Bos. & Pul. 172; Gwill. 1531; *sed* vide Warden of St. Paul's v. Morris, 9 Ves. 155; Bennett v. Treppas, Bunb. 106, 143; 2 Bro. P. C. 437; Gwill. 633; 1 Eagle on Tithe, 170.‖

By the 27 H. 8, c. 20, § 1, it is enacted, "That every person, according to the laudable usages and customs of the parish, or other place where he dwelleth, shall yield and pay his tithes and other duties of holy church."

By the 32 H. 8, c. 7, § 2, it is enacted, "That all persons shall fully, truly, and effectually divide, set out, yield, or pay all tithes, according to the lawful customs and usages of the parishes or places where such tithes or duties shall grow, arise, come, or be due."

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By the 2 & 3 Ed. 6, c. 13, § 1, after enacting that the statutes made in the twenty-seventh and thirty-second years of the reign of the late King Henry the Eighth, concerning the true payment of tithes and other duties, shall abide in their full strength and virtue, it is further enacted, "That all persons shall truly and justly, without fraud or guile, yield and pay all manner of predial tithes, in their proper kind, as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act, or of right or custom ought to have been paid."

And by § 8, it is enacted, "That in every place the same custom of payment of personal tithes, which had been observed within forty years before the making of this act, shall be observed and continue."

The limitation in this statute, to forty years before the making thereof, agrees with the ecclesiastical law, by which, if any tithe had been paid in a certain way for the space of forty years, such payment would have made a good custom against the church.

Cro. Ja. 454, Dobitoshe v. Curteen; ‖Gwill. 287; 1 Eagle & Youn. 262.‖

The construction of these statutes has constantly been, that a custom of a parish as to the payment of tithes is not to be regarded unless it be a reasonable one.

Wherever the tithe of a thing is due of common right, as of wheat, a custom of a parish to pay less than the tenth part for tithe is bad; because this custom, which amounts to a proscription *in non decimando* as to part of the thing, is unreasonable.

1 Sid. 278; 1 Lev. 179; Ld. Raym. 359; 12 Mod. 206; 1 And. 99.

But where the tithe of a thing is due by custom, as of fish taken in the sea, a custom of a parish to pay less than the tenth part is good: and indeed there seems to be no way, except by the custom, of ascertaining what is to be paid for a tithe which is only due by custom.

Noy, 108, Holland v. Heale, 1 Sid. 278; 1 Lev. 19.

It was alleged, that by the custom of a parish the tenth part was without fraud to be delivered to the rector, in full satisfaction for the tithe of wool; and that this was to be delivered *absque visu et tactu novem partium ejusdem lanæ per rectorem.* The custom was holden to be unreasonable; for although it be alleged that the tenth part of the wool was to be delivered without fraud, yet this is to be delivered in such manner as is extremely liable to fraud. It is moreover contrary to reason, that the person who is to pay tithe should be the sole judge whether it be justly paid.

Hob. 107; Wilson v. The Bishop of Carlisle, Bunb. 321; ‖Gwill. 279, and Eag. & Y. 250; and see 13 East, 261; 2 Taunt. 55.‖

‖It seems that the tithe of wool may be lawfully set out, either by number or weight, according to the custom of the place.

Jenkinson v. Royston, 5 Price, 495; Gwill. 1878.‖

The custom was, that the tenth sheaf of such corn as was bound up in sheaves was to be paid in full satisfaction for the tithe of all corn grown upon certain lands. This was adjudged a bad custom, because it admits of the paying as little for tithe of corn as the occupier pleases; for he may choose how much of the corn he will bind up in sheaves.

1 And. 199, Adam's case. ‖*Sed* vide 13 East, 261.‖

In a suit for subtracting tithe, the defendant alleged, that by the custom

(L) How far Custom regarded in setting out Tithes.

of a farm, the occupier of the farm, after having set out the tithe of corn, was to take back thirty sheaves of the tithe. As it was not averred that the farm was a large one, this custom was holden to be bad; for, if it were a small farm, there might be no more than thirty sheaves set out for tithe, in which case the parson would have no tithe.

Godb. 234, Jacks v. Cavendish.

It was alleged, that by the custom of a parish, when certain lands are sown with corn, the parson is to have for tithe the corn grown upon every tenth land, beginning to reckon from the land next the church. It was holden that this custom, which puts it into the power of the occupier, by neglecting to manure and sow the tenth lands properly, to make the tithes thereof worth very little, is unreasonable, and therefore bad.

1 Leon. 99, Stebbs v. Goodlake; Moor, 913; 2 P. Wms. 569; Vin. Abr. tit. *Dismes*, B, a, pl. 17.

[A custom of a parish to tithe wheat by throwing aside every tenth sheaf, as the corn is about to be carried, is bad.

Tennant v. Stubbing, Anstr. 841.]

‖So, a custom to set out the tithe of hops by the tenth hill, where the rows are unequal, leaving the binds uncut, and the poles standing, cannot be supported; for, by common law, hops are tithable after they are gathered from the bind; and this custom gives no equivalent for the additional labour thrown on the parson.

Knight v. Halsey, 7 Term R. 86; Gwill. 1538; 2 Bos. & Pul. 172.

But a custom for the parson to take the eleventh shock of wheat was held good, where it appeared that the farmer was always used to put the sheaves into shocks, and in case of bad weather to open them to dry; since the wheat, which, at common law, is tithable in the sheaf, was thus advanced to a further state of preparation.

Smith v. Sambrook, 1 Maule & S. 66.

The same custom, however, as to barley was held bad, where the farmer merely put it into cocks, without doing any thing further, except opening them in case of wet weather; since this was too minute a benefit to the parson to amount to a consideration for the deduction.

Smith v. Sambrook, 1 Maule & S. 66.‖

The custom of a parish was to pay tithe in kind of sheep, if they were kept a whole year in the parish; but if they were sold before shearing time, only a halfpenny was to be paid for the tithe of each sheep. This was adjudged an unreasonable custom; for thereby the tithe of sheep may, at the owner's pleasure, be made worth very little.

March, 79, Weedon v. Harding.

It was alleged, that by the custom of a parish, the tenth lamb was to be paid for the tithe of all lambs yeaned in the parish; and that in consideration of this no tithe was to be paid for ewes depastured in the parish, which did not yean therein. This was holden to be a bad custom; for, by taking the ewes out of the parish a little before the time of yeaning, the parson may be deprived of his tithe of sheep.

12 Mod. 498, Selby v. Bank. ‖See Boys v. Ellis, Bunb. 139; Gwill. 647; Hall v. Maltby, 6 Price, 240; Gwill. 1888.‖

A custom to pay tithes of lambs upon Saint Mark's day, was holden to

be unreasonable, because, at that time, lambs are in the general so young, that they are not able to live without their dams.

Bunb. 133, Reignolds v. Vincent. ‖See Welch v. Uppill, 3 Moo. 330; Gwill. 1819; Jenkinson v. Royston, 5 Price, 495.‖

(M) Of the Time and Manner of paying personal Tithes, where there is no Custom in a Parish.

By the 2 & 3 Ed. 6, c. 13, § 7, it is enacted, "That every person, liable to the payment thereof, shall yearly, at or before Easter, pay for his personal tithe the tenth part of his clear gain, his charges and expenses, according to his estate, condition, or degree, to be therein abated, allowed, and deducted."

It was determined in the House of Lords, upon an appeal from the Court of Exchequer, that the occupier of a corn-mill is only liable to pay, for his personal tithe, the tenth part of his clear profit, after the charge of erecting the mill, and the expenses of horses, servants, and all other things are deducted.

1 Eq. Ca. Abr. 366, Newte v. Chamberlain; 1 Br. P. C. 157, S. C.; ‖Gwill. 596; and see Manby v. Taylor, 9 Price, 249; 2 Eag. & Youn. 696.‖

It is said to have been the opinion of Gilbert, Chief Baron, that Easter offerings were at first a compensation for personal tithes.

Bunb. 174.

And this opinion seems to be confirmed by two late cases in the Court of Exchequer; in which the court unanimously agreed, that Easter offerings are due of common right.

Bunb. 173, 198; Ambl. 72, S. P. ‖See 1 Eagle on Tithes, c. viii.‖

For it cannot reasonably be supposed that an Easter offering is due of common right, unless it be at the same time supposed that it was at first paid in lieu of something due of common right: and it seems more probable that it was at first paid in lieu of the tithe of personal labour, than of any other thing.

‖By 2 & 3 Ed. 6, c. 13, § 10, it is enacted, that all and every person and persons, which, by the laws and customs of the realm, ought to make or pay their offerings, shall yearly from henceforth well and truly content and pay his or their offerings to the parson, vicar, proprietor, or their deputies or farmers, of the parish or parishes where it shall fortune or happen him or them to dwell or abide, and that at such four offering days as at any time heretofore, within the space of four years last past, hath been used and accustomed for payment of the same; and in default thereof, to pay for their said offerings at Easter then next following. The four offering days are most commonly Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church.

Gibs. 739.‖

(N) Of the Time and Manner of setting out predial Tithes, where there is no Custom in a Parish.

It is laid down in divers books, that only one predial tithe can be due in the same year from the same land.

Fitz. N. B. 5; Bro. *Dism.* pl. 16; 2 Inst. 652; 11 Rep. 16.

But it seems to be now settled, that more than one predial tithe may be due from the same land in the same year.

(N) Of setting out predial Tithes by the Common Law.

It was holden many years ago, that tithe is due of aftermath hay.

1 Roll. Abr. 640, pl. 11, Pasch. 41 Eliz.

It was holden by the Court of Exchequer in a modern case, that garden grounds shall pay tithes of the different crops produced in the same year; and that tithe is due of turnips when pulled, although they grow upon land which has in the same year paid tithe.

Bunb. 10, Benson v. Watkins, Hil. 3 G. 1; ‖Gwill. 612. See 1 Eagle on Tithes, 327.‖

And in a still later case it was holden by the same court, that if land be sown with turnips in the same year that tithe of corn grown thereon has been paid, and be fed with sheep or any unprofitable cattle, tithe is to be paid of the turnips.

Bunb. 314, Swinfen v. Digby, Hil. 5 G. 2. ‖*Sed* vide Wright v. Elderton, *contrà*, 1 Wood, 518; Gwill. 607.‖

It was indeed in one case holden, that no tithe is due of aftermath hay; but the reason given in this case for such hay being exempted from the payment of tithe is, that, by the custom of the parish, the occupier was to bestow some extraordinary labour about the tithe of the first crop of hay.

Cro. Ja. 42, Hall v. Fettyplace. ‖Where there is no special custom to the contrary, founded on consideration, it is now settled that tithe is due of aftermath hay; and the rule seems to have been introduced to prevent fraud in the severance of the first crop. See Toll. on Tithes, 63.‖

It is laid down in one case, that a predial tithe is to be set out as soon after the corn, or other thing of which it arises, is severed, as this can well be done, if there be no custom to the contrary.

Freem. 335, Anon.

And it is in another case said, that if a man, either negligently or with design, suffer apples to hang longer upon the trees than they ought to hang, and they should be stolen, he shall account for the tithe thereof.

Hetl. 100, Anon.

In a modern case in the Court of Exchequer it was said by the court, that all the wheat growing in a field must be cut down, before the tithe of any part of the wheat can be set out.

MS. Rep. Mather v. Holmwood, Mich. 5 G. 3.

In a subsequent case in the same court, wherein a question was, Whether all the wheat growing in a field must be cut down before the tithe of any part of the wheat can be set out, the case of Mather v. Holmwood was cited, and relied upon by the counsel for the plaintiff, as a determination in point. The late Mr. Hussey, after opening for the defendant, observed, that the question was not, according to his recollection, much argued in the case of Mather v. Holmwood; for that, some circumstances of fraud appearing in that case, he, who was of counsel with the defendant, recommended to his client to submit to a decree, for accounting for the tithe in question without costs. Having observed this, he, with that delicacy and candour for which he was most remarkably distinguished, begged to be informed by the court, whether he was precluded, by any thing which fell from the court in the case of Mather v. Holmwood, from arguing the question in the present case. Hereupon Parker, Chief Baron, said, that it was the desire of the court to have the question, it being a question of the utmost importance, fully argued; and, which showed true greatness of mind as well

as goodness of heart, he added that, for his own part, he should be glad to reconsider the question, in order to have an opportunity, in case he should see reason for it, of departing from an opinion he had for some time entertained. After hearing the question fully argued, and taking time to consider, the opinion of the court was, that it is not necessary to cut down all the wheat growing in a field, before the tithe of any part of the wheat is set out; and that the tithe may be set out, as often as a reasonable quantity of the corn growing in a field is cut down. Another question in this case was, Whether all the barley or oats growing in a field must be cut down, before the tithe of any part of the barley or oats can be set out? The opinion of the court was,—That it is not necessary to cut down all the barley or oats growing in a field, before the tithe of any part can be set out; and that the tithe may be set out as often as a reasonable quantity of the corn growing in a field is cut down. The court did not ascertain what is a reasonable quantity of corn to be cut down, before any tithe is set out. So far from doing this, it was said, that it could not be done; inasmuch as it must always depend upon the circumstances of the particular case, whether the tithe was set out before a reasonable quantity of corn was cut down.

MS. Rep. Erskine v. Ruffle, Mich. 9 G. 3; [Hall v. Macket, E. 37 G. 3, *in Scacc.*]

‖A farmer is not in general at liberty to begin to cut and tithe a part of a field, and then to proceed to another field and cut part of that before finishing the other; though this rule admits of exceptions, in respect of partial ripeness of the corn, uncertainty of weather, &c.; and there is no rule which obliges him to tithe the whole of that part of a field which lies in one parish, before he proceed to tithe any part of the same field lying in another parish. Therefore, where a farmer cut the whole of a field of barley lying in the parishes of A and B, and after cocking and tithing part in A, proceeded to cock and tithe part in B; and the weather being catching, he carried that part which was tithed in A the day before the rest of the field in A was cocked and tithed, and without previous notice of his intention to carry such part; this being done *bonâ fide*, the court held it was lawful.

Leathes, clerk, v. Levinson, 12 East, 239; Gwill. 1652.‖

By the 2 & 3 Ed. 6, c. 13, § 2, it is enacted, "That at all times and as often as predial tithes shall be due, and at the tithing-time of the same, it be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, to view and see their said tithes to be justly and truly set forth and severed from the nine parts."

But it is not necessary for the occupier of land to give notice to the person entitled to a predial tithe, or to give notice in the church, at what time he intends to set the same out.

1 Roll. Abr. 643, X, pl. 1; 2 Ventr. 48.

And in a modern case, Carter and Comyns, Barons, were of opinion, that even a custom of a parish, to give notice at what time a predial tithe is to be set out, would be unreasonable; for the person entitled to the tithe may live at the distance of a hundred miles from the parish.

Bunb. 333, Beaver v. Spratley, Hil. 7 G. 1.

But Reynolds, Chief Baron, was of opinion, that such a custom would

(N) Of setting out predial Tithes by the Common Law.

be good;(*a*) because notice to a servant would in that case be sufficient.

‖ (*a*) It is now settled, that such a custom is good. Butter v. Heathby, Burr. 1891; Gwill. 928. An action on the case will not lie against the parson for not taking away the tithe, unless such notice is given; and as to what notice is sufficient, see Gwill. 1439; Kemp v. Filewood, 11 East, 358; Sir W. Scott's judgment in Filewood v. Marsh, 1 Hagg. R. 478.‖

The general rule, as to the manner of paying a predial tithe, is, that the tenth part of the thing from which it arises is to be justly and truly set out upon the land upon which it arises.

In some cases the manner of setting out a predial tithe is ascertained by judicial determination.

It has been holden, that every tenth sheaf of corn is to be set out for the tithe thereof.

1 Sid. 283, Ledgar v. Langley.

And it was said *arguendo*, that the sheaves set out for tithe of corn ought to be marked with a green bough.

Bunb. 186, Boughton v. Wright.

The occupier of land is not of common right obliged to gather the sheaves of corn, which have been set out for tithe, into shocks.

1 Sid. 283, Ledgar v. Langley.

But he may by custom be obliged to do this, and the person having a right to the tithe may at any time bring a bill in a court of equity for the establishment of the custom.

2 Atk. 136, Archbishop of York v. Sir Miles Stapleton. ‖Gwill. 772; 2 Eag. & Youn. 83.‖

Before the nine sheaves of the occupier of the land are put into a carriage to be carried away, the whole ten are to be set out upon the ground, that the person entitled to the tithe thereof may have an opportunity of judging whether the same be fairly set out.

Bunb. 186, Boughton v. Wright.

‖Therefore the farmer cannot legally before tithing put all the sheaves when bound immediately into large shocks, or riders, consisting of eight sheaves, set upon their ends against each other, with two covering sheaves placed roofwise on the top for the purpose of protecting the whole from bad weather, and then draw the tenth sheaf from the shock, without taking the rest of the shock to pieces: for the parson is thus deprived of a reasonable and convenient opportunity of comparing the tenth with the other nine sheaves; and the corn ought to be tithed in the sheaf, before it is put into shocks or riders.

Shallcross v. Jowle, 13 East, 261; and see 2 Taunt. 55.‖

In a very late case in the Court of Exchequer, the opinion of the court, upon great consideration, was, that unless there be a custom of the parish to set the tithe of barley out in some other manner, the barley must be gathered into cocks, and every tenth cock must be set out for tithe.

MS. Rep. Ereskine v. Ruffle, Mich. 9 G. 3. ‖See 1 Maule & S. 66.‖

In one book it is laid down, that tithe for depasturing cattle is to be paid for at the rate of two shillings in the pound of the money received for the depasturing.

Freem. 329, Anon.

But it seems to be the better opinion, that tithe for depasturing cattle is

to be paid for at the rate of two shillings in the pound of the annual value of the land whereon the cattle were depastured.

Hardr. 184.

It is in one case laid down, that the tithe of grass mowed is to be set out before it is made into grass-cocks.

Hob. 250, Hide v. Ellis, Hil. 16 Ja. 1; ‖Gwill. 431; 4 Eag. & Youn. 303.‖

But it was in a modern case holden, that the tithe of grass mowed is not to be set out until it is made into grass-cocks.

[2 P. Wms. 523. In a note on this case by the editor, it is said, the tithes are called the tithes of hay, and not of grass. 3 Burn. Eccl. Law, 441.]

‖It is settled, that the common-law mode of tithing hay is in grass-cocks, after the grass has been tedded in the process of making it into hay.

Newman v. Morgan, 10 East, R. 5; Halliwell v. Trapps, 2 Taunt. 55.‖

[Where, by the usual mode of husbandry, clover-hay is not made into cocks at all, the tithe may be set out in the swathe.

Collyer v. Howes, Anstr. 481.

This case has, however, been re-heard by the Court of Exchequer, and the former decree has been reversed. It appeared from the additional evidence introduced upon the re-hearing, that in the usual course of husbandry clover does get into the shape of cocks, so that the ground of the former decision failed. The court said that it was like the case of soft corn, which, it had been decided, was not tithable in the swathe.

Tr. 37 G. 3, Toller, 82.]

The person entitled to the tithe of grass mowed, is to be allowed a convenient time for making it into hay upon the land on which it grew.

Bro. *Dism.* pl. 12; 1 Roll. Abr. 643, X, pl. 2; Str. 245.

It was formerly doubted whether the tithe of hops were to be set out by the tenth hill as soon as the binds were severed from the ground, or by the tenth measure after the hops were picked.

Sid. 283, Ledgar v. Langley, Pasch. 18 Car. 2.

But it has been determined in two cases, that the tithe of hops is to be set out by the tenth measure, after they are picked.

Bunb. 20, Chilly v. Reeves, Trin. 2 Ja. 2; Bliss v. Chandler, Mich. 7 G. 1.

The same was determined in a modern case by the Court of Exchequer; and the decree of this court was affirmed upon an appeal to the House of Lords.

MS. Rep. Tyers v. Walton, in Dom. Proc. 15th May, 1753; [Knight v. Halsey, 7 Term R. 86, S. P.;] ‖2 Bos. & Pul. 172; 8 Bro. P. C. 233.‖

In some cases, the manner of paying a predial tithe is ascertained by acts of parliament.

By the 11 & 12 W. 3, c. 16, it is, for the better ascertaining the tithes of hemp and flax, enacted, "That every person who shall thereafter sow any hemp or flax in any parish or place within England, Wales, or Berwick-upon-Tweed, shall pay to the parson, vicar, or impropriator of such parish or place, yearly, the sum of five shillings and no more, for each acre of hemp or flax, before the same is carried off the ground, and so in proportion for more or less ground so sown."

‖This statute is made perpetual by 1 G. 1, st. 2, c. 26, s. 2.‖

By the 31 G. 2, c. 12, it is, for the encouragement of the growth of madder, enacted, "That every person who shall thereafter plant or culti-

vate any madder, in any parish or place within that part of Great Britain called England, shall pay to the parson, vicar, curate, or impropriator of such parish or place, yearly, the sum of five shillings and no more for each acre thereof, and so in proportion for more or less ground so planted or cultivated, in lieu of all manner of tithe of the said madder."

‖Continued for fourteen years, by 5 G. 3, c. 18, and not since renewed; so that madder is now tithable in kind.‖

But it is in both these statutes provided, that nothing therein contained shall extend to charge any land which is discharged of tithe by a *modus*, an ancient composition, or otherwise.

Although two persons are entitled to moieties of a predial tithe, the occupier of the land is not bound to set it out in moieties; for it is the duty of the persons to whom the tithe is due to divide it after it is set out.

Lat. 24, Stilman v. Cromer; ‖1 Eag. & Y. 354.‖

‖A parson is not entitled to use every road, for carrying away the tithes, which the farmer may use for the occupation of his farm: and the rule seems to be, that he may use only such road as the farmer uses for the occupation of the close in which the tithes grew.

Cobb v. Selby, 2 New R. 466.‖

(O) Of the Time and Manner of setting out or paying mixed Tithes, where there is no Custom in a Parish.

It is in general true, that mixed tithes, which arise from things inanimate, are to be set out or paid as soon as they can conveniently be severed from the nine parts.

Freem. 335, Anon.

The general rule as to the manner of setting out a mixed tithe, arising from an inanimate thing, is, that the tenth part of the thing is to be set out at the place where it arises.

But the manner of setting out mixed tithes has, in some cases, been ascertained by judicial determinations.

The tenth meal of milk of all a farmer's cows, is to be set out for the tithe of milk; for if the person entitled to tithe of milk should be obliged to send for the tenth part of every meal, it would very often be not worth the sending for.

Raym. 277, Dod v. Engleton.

[It is now settled, that the mode of setting out tithe-milk is, that the entire tenth meal of the whole herd of cows should be set forth every tenth day, both morning and evening meal, at one and the same time.

Besworth v. Limbrick, 2 Raym. 825; Hutchins v. Full, 3 Raym. 1010.]

It has been decreed, that the tithe of milk is to be carried by the parishioner to the parsonage-house.

Raym. 277, Dod v. Engleton.

But Holt, Chief Justice, was of opinion that the parishioner is only obliged to set out the tithe of milk; and he said that that decree in Dod and Engleton was rather an equitable one, and founded upon the custom of the neighbouring parishes.

Ld. Raym. 359, Hill v. Vaun.

And in a modern case, the whole Court of Exchequer were of opinion, that the parishioner is only obliged to set out every tenth meal of milk at the usual place of milking;—that the person entitled thereto ought to fetch

(P) Of paying Tithes due by Custom.

it away in his own pail or vessel;—and that if he do not fetch it away before the next milking time, the parishioner may pour it on the ground, because he may then have occasion for the pail or vessel in which it was set out.

Bunb. 73, Dodson v. Oliver, Pasch. 8 G. 1; Ambl. 72, S. P.

The tenth part, by weight, is to be delivered for the tithe of wool.

12 Mod. 498.

Such mixed tithes as arise from the young of beasts, birds, or fowls are in general to be set out or paid as soon as the young beasts, birds, or fowls can well live without the old ones.

Bunb. 133, Reignolds v. Vincent. ‖In a late case the court of C. B. decided, that the tithe of calves and lambs accrues when they are dropped; but that they are not tithable till they can be weaned, and live without their dams. Welch v. Uppill, 3 B. Moo. 384; and see Gwill. 630, 1058.‖

It has been holden, that tithe is not to be paid for any number of young beasts, birds, or fowls under ten; but that this number is to be carried over to the account of the next year.

12 Mod. 497, Selby v. Bark, Pasch. 13 W. 3.

But in a modern case it was decreed by the Court of Exchequer, that if the number of young beasts, birds, or fowls be under ten, this number is not to be carried over to the next year's account: but the tenth part of the value thereof in money is to be paid for tithe.

Bunb. 198, Egerton v. Still, Trin. 12 G. 1. ‖See Toll. on Tythes, 143, 144, (3d edit.)‖

(P) Of the Time and Manner of paying Tithes due by Custom.

It is in general true, that where a tithe is due by custom, the time and manner of paying it are ascertained by the custom; and indeed there seems to be no other way, than by the custom, to ascertain the time and manner of paying a tithe, which is only due by custom.

But the time and manner of paying tithes of houses in London are ascertained by statutes.

By the 37 H. 8, c. 12, § 2, it is enacted, "That the inhabitants of the city of London shall yearly, without fraud or covin, pay their tithes to the parsons, vicars, and curates of the said city, after the rate following; that is to wit, of every ten shillings rent by the year of every house within the said city sixteen pence halfpenny, and of every rent of twenty shillings of every such house two shillings and ninepence."

‖Vide the decisions on this statute, Gwill. 164, 329; Noy, 130; 2 Inst. 660· Gwill. 299, 503, 546, 891, 1054; 2 Ves. J., 563; 4 Price, 65; 5 Price, 14; 9 Ves. 155; 2 Ves. & B. 1; 13 Ves. 9; Toll. on Tythes, 229, (3d edit.); and see *antè*, p. 8, *notà*.‖

And by § 11, it is enacted, "That the said inhabitants shall pay their tithes quarterly, by even portions."

But by § 18, it is enacted, "That where a less sum than is by this act directed to be paid for tithe, hath been accustomed to be paid for the tithe of any house, that then the inhabitant of such house shall pay tithe only after such rate as hath been accustomed."

By the 22 and 23 Car. 2, stat. 2, c. 15, § 1 & 2, after reciting that tithes in the city of London were paid with great inequality, and are since the late dreadful fire, in rebuilding the same, by taking away of some houses, altering the foundations of the others, and the new erecting of others, so

disordered, that in case they should not, for the time to come, be reduced to a certainty, many controversies and suits of law might thence arise, it is enacted, "That an annual certain sum of money therein mentioned shall in lieu of tithes be paid, in all the parishes within the said city, whose churches have been demolished or in part consumed by the late fire."

And by § 3, it is enacted, "That the respective sums of money to be paid in the said respective parishes, and assessed as therein is directed, shall be deemed and taken to be the respective certain annual maintenance (over and above glebes and perquisites, gifts and bequests, to the respective parson, vicar, or curate of any parish, or to the successors) of the respective parsons, vicars, or curates, who shall be legally instituted, inducted, and admitted into the said respective parishes."

By § 10, it is enacted, "That the impropriator or impropriators of any of the said parishes shall pay and allow, what really and *bonâ fide* they have used and ought to pay and satisfy, to the respective incumbents of such parishes at any time before the said fire, and the same shall be esteemed and computed as part of the maintenance of such incumbent."

‖The tithes of these parishes were augmented by stat. 44 G. 3, c. 89, intituled "An act for the relief of certain incumbents of livings in the city of London," whereby, after reciting that the said first-mentioned act had failed in providing a proper maintenance for the parsons, vicars, and curates in those parishes, inasmuch as the respective incomes being by the said acts fixed at very low rates, the same are, by the decreased value of money, the enhanced price of all the necessaries of life, and by various other circumstances peculiarly attached to the incumbents of the city of London, become greatly insufficient for the due support of their situation and characters, it is enacted, that instead of the annual tithes of the parishes within the city of London, and the liberties thereof, whose churches were demolished or in part consumed by fire, the annual certain tithes, or sums of money in lieu of tithes, of those parishes shall be increased to certain sums in the act stated.

Toller, p. 232; Mirehouse, p. 295.‖

(Q) In what Cases the Payment of Tithes may be suspended.

1. *Of the Produce of Lands in the King's Hands.*

It is laid down in one case, that the king is exempted, by virtue of his prerogative, from the payment of tithes.

Cro. Eliz. 511, Wright v. Wright.

But in another case it was holden, that even the demesne lands in the crown are not exempted, by virtue of the prerogative, from the payment of tithes.

Hardr. 315, Compost's case.

Tithes are not due of the produce of lands in the king's hands; because the appropriation of parochial tithes does not extend to such lands.

1 Johns. 387, Earl of Hertford v. Leech.

The privilege, however, of being exempted from the payment of tithes is personal to the king; and does not extend either to his grantee or lessee.

1 Jon. 387, Earl of Hertford v. Leech; Cro. Eliz. 511.

2. *Of the Produce of Lands which have been barren.*

By the 2 & 3 Ed. 6, c. 13, § 5, it is enacted, "That all barren heath or waste grounds, other than such as be discharged of the payment of tithes

by act of parliament, which before this time have paid no tithes by reason of their barrenness, and now be, or hereafter shall be, improved and converted into arable ground or meadow, shall from henceforth, after the end of seven years next after such improvement, pay tithes of the corn and hay growing upon the same."

There is not in this statute an express suspension of the payment of tithes, for the lands therein mentioned; but there is certainly an implied suspension, for the space of seven years next after the improvement of the lands.

2 Inst. 656.

It has been constantly holden, that only such land is barren, within the meaning of the statute, as produces nothing profitable by reason of its natural barrenness.

2 Inst. 656; Freme. 335; 6 Mod. 96; Ld. Raym. 991; 3 Bulstr. 166; [Stockwell v. Terry, 1 Ves. 115; 2 Rayn. 445.]

‖The construction of this section of the statute was much discussed in a recent case in the Court of King's Bench, in which the judge at *Nisi Prius* laid it down, that in order to bring land within the exemption of the statute as barren land, it was necessary that it should be such land as would not bear a crop worth more than the expense of ploughing, sowing, and reaping, without manuring or tillage; that is, without some manuring or tillage. But the court granted a new trial, and decided that the above rule confined the exemption within too narrow limits; and that the true rule for determining what is "barren land" within the statute, is whether the land is of such a nature as necessarily to require *extraordinary* expenditure of manure or tillage in order to bring it into cultivation. The case went to a second jury; and the judge, upon the second trial, directed the jury according to the rule above established. A second verdict was found for the defendant in favour of the exemption; and a new trial was then moved for, on the ground of the verdict being contrary to evidence. It appeared that the land was pronounced by several witnesses expressly to be land of good natural quality; that, on first breaking it up, it was ploughed three times, which was twice more than was usual in breaking up grazing land of that description; and that it was limed, which was usual in breaking up land not ploughed before, and the quantity of lime used did not appear extraordinary. The crop of the first year was middling, that of the second year was much better, after only one ploughing and without any manure. In the third and fourth years, a witness swore the land was worth forty shillings per acre, to be let for seven years. The court, after argument, decided (Bayley, J., *dissentiente*) that the evidence was to be considered with reference to the question whether the land was barren in its natural quality, *suapte naturâ sterilis;* that the *onus* lay on the defendant to show that it was so; and that as it clearly appeared that the land was good in its natural quality, and as the lime (even if the quantity were unusual) appeared to have been employed for the purpose of getting rid of the *incidental impediments* to cultivation left in the land by the whins and furze which had before covered it, and not for the purpose of overcoming any *natural infecundity* in the soil, (and the circumstance of the expense of the lime, being caused by the accidental distance of the pits, could not be taken into consideration,) the land was not within the description of "bar-

ren land" in the statute. A new trial was accordingly directed; but the defendant declined going to another jury.

Warwick v. Collins, 2 Maul. & S. 349, *acc.*; Selsea v. Powell, 6 Taunt. 297; Kingsmill v. Bellingley, 3 Price, 465; 3 Eag. & Youn. 791, S. C.; Warwick v. Collins, 5 Maul. & S. 166.

If land, which has from time immemorial been full of bushes, be grubbed, and converted into arable ground or meadow, tithes of the corn and hay thereupon grown are immediately due; because the land was not naturally barren, but became so by negligence.

Cro. Eliz. 475, Sherington v. Fleetwood.

If wood-land be grubbed, and converted into arable ground or meadow, tithes of the hay and corn thereupon grown become due immediately.

Bunb. 159, Beardmore v. Gilbert; 3 Bulstr. 165.

Tithes are due immediately of the corn and hay grown upon broom-land, which has been grubbed and converted into arable ground or meadow.

Roll. R. 39, Mascal v. Price.

If land, which has from time immemorial been overflown by the sea, be drained, the payment of tithes of the corn and hay grown upon this land is not suspended; because the land was not in its nature barren, but became so by accident.

3 Bulstr. 165, Wit v. Buck; Cro. Eliz. 475.

This statute does not suspend the payment of any tithes, which were paid before the improvement of the land.

For by § 6, it is enacted, "That if any barren heath or waste ground hath before this time paid any tithes, and the same be hereafter improved and converted into arable ground or meadow, the owner thereof shall, during the seven years next after the same improvement, pay such kind of tithes as were paid for the same before the said improvement."

3. *Of the Produce of Glebe Lands.*

So long as the rector of a parish holds his glebe in his own hands, the payment of small tithes arising thereupon is suspended; notwithstanding the vicar of the parish is endowed of all small tithes arising in the parish: for the maxim is, *ecclesia decimas solvere ecclesiæ non debet.*

Cro. Eliz. 479, 578; Lutw. 1062. ‖It appears that this maxim only applies as between the parson and vicar of the same church, where the ecclesia would be paying tithes to itself; but not to cases of a distinct ecclesiastical person claiming exemption. 4 Price, R. 77.‖

But if a rector let his glebe, the tenant is liable to pay the small tithes arising thereupon to the vicar, and the great to the rector.

Bro. *Dism.* pl. 17; Cro. Eliz. 479, 578.

For the same reason the vicar of a parish shall not, during the time he occupies his own glebe, pay any tithes, arising thereupon, to the rector or impropriator of the parish.

1 Brownl. 69, Harris v. Cotton.

But if a vicar let his glebe, the tenant is liable to pay the great tithes arising thereupon to the rector or impropriator, and the small to the vicar.

1 Brownl. 69, Harris v. Cotton.

An impropriator is likewise exempted from the payment of the small

tithes arising upon his glebe to the vicar, so long as it is in his own hands; for the maxim extends to him also.

Hetl. 31, Booth v. Franklin; Fitzg. 7.

But if an impropriator let his glebe, the small tithes arising thereupon are due to the vicar, and the great to himself.

Hetl. 31, Booth v. Franklin; Fitzg. 7.

If a rector, vicar, or impropriator, who has sown his glebe, die before the corn is severed, the executor of the rector, vicar, or impropriator must pay tithe thereof; for although an executor be in general the representative of his testator, he is not so in his spiritual capacity.

1 Brownl. 69, Harris v. Cotton.

4. *Of Discharge of Payment of Tithes by Composition real.*

A *composition real* is where an agreement is made with the incumbent of any church, together with the patron and ordinary, under their hands and seals, that the lands specified shall be exempt from the payment of tithes for the considerations mentioned in the stipulation. Such compositions have ever been allowed to be a good discharge of the payment of tithes. But since the statute 13 Eliz. c. 10, for preventing the alienation of ecclesiastical estates, no composition of this kind can be made; and such as appear to be of later date are holden to be of no force. It seems, (*a*) however, that there have been decrees made in courts of equity to confirm compositions entered into by consent of the parson, patron, and ordinary, though subsequent to the statute; but only where they have appeared to be for the benefit of the church. But it should appear from later decisions, (*b*) that even compositions confirmed by such decrees are not binding against the succeeding incumbent.

Deg. p. 2, c. 20. (*a*) 1 Wils. 128. (*b*) Attorney-General v. Cholmley, 3 Burn's E. L. 416; Ambl. 510; 6 Br. P. C. 332; Mortimer v. Lloyd, 7 Br. P. C. 493; Cartwright v. Knowlton, *Scacc.* 24 Apr. 1779.

A composition real commencing within time of memory, its commencement must be shown: but it is not necessary to produce the actual deeds under which it took place. Presumptions are admitted in this as in other cases: and the existence of such deeds may be inferred from other evidence. It is not necessary that the consent of all the parties should be by the same deed. This may frequently not happen: in the case of the king, who consents by letters patent, it never can take place.

Sawbridge v. Benton, Anstr. 372.

But a composition real is not supported by evidence of immemorial payment.

Robertson v. Appleton, *Scacc.* 22; Feb. 1777, cited in Anstr. 375.

‖This doctrine is confirmed by a decision in the House of Lords; and in a recent case the Vice-Chancellor, in deciding that a pecuniary payment for two hundred years in lieu of tithes did not raise any presumption of a deed creating a composition real, says, "There is no case in which a composition real has been presumed from the mere fact of a pecuniary payment. If such a rule were adopted, every payment which is ranked as a *modus* might be established as a good composition real. It is not necessary that the deed creating the composition real should be proved by direct evidence. It may be established by presumptive evidence; but if there be no other

(R) Of a *Modus decimandi.*

evidence of the composition than mere payment, the legal inference and presumption is that the composition originates in that deed."

Knight v. Halsey, 2 Bos. & P. 206; Estcourt v. Kingscote, 4 Madd. 140; and see Chatfield v. Fryer, 1 Price, 253; Ward v. Sheppard, 3 Price, 608; Bennett v. Skeffington, 4 Price, 143.

A real composition for tithes is now frequently effected by act of parliament.

Where an enclosure act enacts that the commissioners shall set out, allot, and award portions of common to impropriate rectors and curate in lieu of tithes, and shall distinguish by their award the several allotments given to the impropriate rectors and curate, and the same are declared to be in full satisfaction of tithes; the tithes are not extinguished by the mere setting out and allotting parcels of common to the rectors and vicar, but the award of the commissioners is necessary to extinguish them.

Ellis v. Arnison, 5 Barn. & A. 47; and see Cooper v. Thorpe, 1 Swanst. R. 92.‖

(R) Of a *Modus decimandi.*

A MODUS is a real composition for tithe.

It is probable, that every *modus* had its commencement by deed: because a composition for tithe can never become a *modus*, unless the patron and ordinary be parties thereto, or it be confirmed by them.

Hardr. 381, Ingolsby v. Ward, 2 P. Wms. 573. ‖See a *modus* defined, 2 Black. C. 29; 13 Co. 12; and *per* Wood, B., in Bennett v. Neale, Wightw. 324; Gwill. 1678.‖

A vicar and a parishioner had made an agreement, that, for the time to come, a certain sum of money should be paid annually in lieu of tithes; and it was confirmed by the bishop. This was holden to be only a personal contract, and not such a real composition as would bind the successor to the vicar.

Mar. 87, Hitchcock v. Hitchcock.

[An agreement by which the rector had an enclosure and allotment in lieu of his glebe and tithes, was holden to be no bar to the successor's claim of tithes, though the ordinary was a party to it; and it was sanctioned by a decree in equity. To this agreement it should be observed, that the patron was not a party, that the decree was by consent, and nothing was allowed as a compensation for tithes upon improvements *in futuro.*

Ambl. 510, Attorney-General and Blair v. Cholmley.]

‖So, where a covenant or agreement by deed, intended to operate as a permanent composition in lieu of tithes, was made in 1712, by a dean and chapter, who were seised of a rectory in trust for the support of a grammar school, in consideration of a perpetual rent-charge granted by a lord of a manor; it was held that this covenant, though not relating to the possessions of which the dean and chapter were seised in right of their church, was void within the intent and meaning of the disabling statute of 13 Eliz., and consequently did not prevent their successors from demanding tithes in kind.

Dean and Chapter of York v. Middleburgh, 2 Youn. & J., 196.‖

A *modus* may be prescribed for, without producing the deed by which the composition was at first agreed upon: for wherever there has been, for time immemorial, a constant annual payment in lieu of tithe, it shall be intended that the payment had a proper commencement.

11 Rep. 19; Graunt's case, 2 Mod. 321; Cro. Ja. 501; 2 P. Wms. 573.

(R) Of a *Modus decimandi.*

A *modus* is not good, unless the composition were at first reasonable.

It is not, however, at this day necessary to show that the composition was at first reasonable: for there might be, when the composition was agreed upon, some circumstance which then made it reasonable, although this cannot, at so great distance of time, be shown.

2 P. Wms. 573, 574, Chapman v. Monson.

A *modus* must, at its commencement, have been a recompense to the person to whom the tithe was due in lieu of which it was to be paid.

If a man prescribe to be discharged of tithe, in consideration of being obliged to repair the body of the church, this is not a good *modus;* because, as the parson was never obliged to repair the body of the church, this could never have been a recompense to him.

1 Roll. Abr. 649, pl. 8.

But if a man prescribe to be discharged of tithe, in consideration of being obliged to repair the chancel, this is a good *modus;* for this must always have been a recompense to the parson, he being bound to repair the chancel.

1 Roll. Abr. 650, pl. 9.

It is not at this day necessary for the party who would avail himself of a *modus* to show, that it was originally a recompense to the person to whom the tithe was due in lieu of which it was to be paid: for unless it appear, upon the face of the prescription, not to have been so, it shall be intended that it was.

2 P. Wms. 573, Chapman v. Monson.

It is laid down, that a *modus* by prescription may be good against a vicar.

Godb. 180.

But the better opinion seems to be, that, as every *modus* by prescription must have begun at a time whereof there is no memory, no *modus* by prescription can be good against a vicar; because the endowment of all vicarages has been within time of memory.

2 P. Wms. 522. ‖But if a *modus* from time immemorial is proved, it must be presumed to have commenced before the endowment of the vicarage, and when the parson was entitled to all the tithes; and when the parson, by consent of the patron and ordinary, afterwards endowed the vicar with these tithes, this did not prejudice the parishioners, or deprive them of the benefit of the *modus* which they were before entitled to. See 2 P. Wms. 522; 1 Ves. & B. 148. In one case, however, where the plaintiff, a vicar, stated in his bill for an account an endowment of the vicarage, in 1367, and the answer alleged a *modus* payable *to the vicar* from time immemorial for *vicarial* tithes, the Master of the Rolls decreed an account; since it appeared on the pleadings that there was no vicarage till 1367, which was after time of legal memory. Scott v. Smith, 1 Ves. & B. 142; Gwill. 1702; Eag. & Youn. 658. This, however, is a mere formal defect in stating the *modus* as payable to the *vicar* for *vicarial* tithes; and so it was considered in a previous case, Uhthoff v. Lord Huntingfield, 1 Price, 237, n.; and in a subsequent case, Prevost v. Benett, 1 Price, 236; Gwill. 1723; Eag. & Youn. 705, the Court of Exchequer permitted the defendant to restate a *modus* similarly alleged, for the purpose of trying an issue as to the existence of the immemorial payment. And see Lord Redesdale's observations in Bullen v. Michel, 2 Price, 481.‖

It has been holden, that a *modus* by prescription, to be paid to the rector in lieu of all tithes arising in the parish, is a discharge of tithes as against the vicar.

1 Mod. 216.

The thing paid as a *modus* is usually a sum of money.

But the payment of a chattel as a *modus* is good, because the original agreement might as well have been, that a chattel should be paid in lieu of tithes, as that money should.

Salk. 656; Ld. Raym. 360.

It is a good *modus* to prescribe that the parson and his predecessors have, for time immemorial, been seised in fee of one or more closes of land lying in the parish; and have constantly received the profits thereof, in lieu of a particular species of tithe, or in lieu of all tithes arising in the parish.

Hob. 42, Cro. Ja. 501; Cro. Eliz. 587, 736.

An indirect *modus* is good.

A suit being instituted for tithes in kind by the parson of B, the defendant moved for a prohibition, and insisted that he was an inhabitant of the parish of A; that every inhabitant of the parish of A, who held any pasture-land in the parish of B, had, for time immemorial, paid tithes thereof to the parson of A; and that the parson of A had always paid two-pence for every acre of such pasture to the parson of B. A prohibition was granted. And by the court,—It is exactly the same thing as if the defendant had prescribed directly for a *modus* of two-pence for every acre of pasture occupied by him in the parish of B.

Cro. Eliz. 136, Cotford v. Pease.

Tithe is so absolutely and effectually discharged by a *modus*, that although this be not paid, the right of taking the tithe in kind cannot be again resorted to.

Hob. 41, 42, 44.

If a man, through ignorance, set out corn for tithe, upon land discharged of tithe by a *modus*, and the parson take it away, an action of trespass lies against him.

Hob. 42, Cooper v. Andrews.

A *modus* is not destroyed by the payment of tithe in kind for some years.

2 Bulstr. 240, Price v. Mascal.

On the other hand, a *modus* must be paid every year, although no tithe would have been due; for the *modus*, it being a recompense for the tithe, becomes a spiritual fee.

Hob. 42, 44.

If the land, for which there is a *modus*, lie fresh, the *modus* must nevertheless be paid.

Hardr. 184, Holbeach v. Whadcock.

If there be a *modus* to pay thirty eggs, in lieu of the tithe of all eggs, the thirty eggs must at all events be paid.

1 Roll. Abr. 648, pl. 3; Salk. 657; Ld. Raym. 360.

[A *modus* payable by the owners, not the *tenants*, of the land which is covered by it, is good. The common practice, to be sure, is to make the occupier answerable: but perhaps the parties may have thought this mode more beneficial in point of security; and the courts are not nicely to weigh the validity of that judgment. And the land, in respect of which the *modus* is claimed, need not be set out by metes and bounds: that it consists of about so many acres, parcel of an ancient estate called R estate, consisting of so many acres, is a description sufficiently certain.

Ord v. Clarke, Anstr. 638. See also Searr v. Trinity College, Ibid. 765.

(R) Of a *Modus decimandi.*

A *modus* was claimed for hay. The terriers described the *modus* to be for all mowing grass, "except clover and the like." It was objected, that as the article excepted was not known beyond time of memory, a *modus* containing that exception must be modern. But the court thought that the expression in the terrier was not to be taken as an exception to the *modus*, but merely as a memorandum that the *modus* covered natural hay only, and did not extend to modern artificial grasses.

Franklyn v. Spilling, Anstr. 760.

It should seem, that a *modus* of every tenth day's cheese, during twenty weeks from Holyrood-day, in lieu of tithe of milk, is good.

Wake v. Russ, Anstr. 295.]

2. *Of the Certainty required in a* Modus.

A *modus* must be certain as to the sum of money, or other thing, which is to be paid.

A *modus* to pay two shillings in the pound of the yearly rent of the land is void, because as the yearly rent may be raised or fallen at pleasure, the sum of money to be paid must always be uncertain.

12 Mod. 563; Salk. 657; Ld. Raym. 697; Bunb. 20, 174; ‖Gwill. 587; and see note on this subject, Toll. on Tithes, 185.‖

A *modus* to pay one penny or thereabouts for every acre of land is void, by reason of the uncertainty of the sum of money to be paid.

2 Roll. Abr. 265, D, pl. 2; 2 P. Wms. 572.

‖So, a *modus* of three-pence, payable by the occupiers of every ox-gang of land, containing sixteen acres of arable, meadow, and pasture, after the rate of seven yards to the pole or perch, in lieu of the tithe of hay arising on the ox-gang, has been held bad; for there is no specification of the proportions of each different species of land, and there is nothing to pay for an ox-gang of arable only, or an ox-gang of arable and pasture; and by the fluctuation of lands in the parish, it might happen that the arable might be occupied separately from the meadow or pasture.

Markham v. Laycock, Gwill. 1339; and see 17 Ves. 477.

So, a *modus* of 2*l.* 8*s.* 1*d.*, payable within a township, the occupier of each farm or tenement therein paying his proportion, is bad for uncertainty, for there is no means of ascertaining the proportion.

Wolley v. Hadfield, 3 Price, 210; and see Norton v. Hammond, 1 You. & J. 94.‖

[A *modus* to pay a fother of hay in lieu of tithes is void, for uncertainty.

Ambl. 365, Fenwick v. Lambe and others.

A *modus* of a penny, in lieu of tithe of hay of the lands occupied with each house in the parish, is bad.

Travis v. Oxton, Anstr. 309, n.;] ‖3 Wood, 523; 3 Gwill. 1066; 7 Bro. P. C. 49, S. C. *nomine* Whitehead v. Travis.‖

‖But a *modus* of two-pence, (by name of hearth silver, garden silver, shot and waxen silver,) payable by every householder or inhabitant in lieu of tithe of fuel, fruits, agistment, and wood, has been held good. And this case was distinguished by Eyre, B., from that of Travis v. Oxton; since there, the payment being confined to houses having mowing lands, if the mowing lands were taken from the house, the house paid nothing, and the share to which they were added paid no more than before. In

this case, let the occupation vary as it might, the recompense would remain the same.

Bennett v. Read, Gwill. 1272.

But in a case where a *modus* of one penny for the tithes of all hay of every inhabitant and occupier having land producing hay was set up, Sir W. Grant, M. R., doubted the distinction drawn between the above cases, and considered the question of law so doubtful that he declined to decide it till the existence of the *modus* had been established by an issue. However, in a subsequent case, the same learned judge decided in favour of a similar *modus*, on the authority of Bennett v. Read; saying, that as there was no distinction between the principal case and Bennett v. Read, if that case was distinguishable from Travis v. Oxton, so was the principal case. If those cases were not to be distinguished, Bennett v. Read, being the more recent authority, ought to be followed. The next case on the question is that of Williamson v. Lord Lonsdale, where neither the court nor counsel appear to have adverted to the last decision of Sir W. Grant; and the Lord Chief Baron, again questioning the distinction between Travis v. Oxton and Bennett v. Read, followed the example of Sir W. Grant in Blackburn v. Jepson, and directed an issue to try the existence of the *modus*.

Blackburn v. Jepson, 17 Ves. 473; reversed, vide *infrà*; Leyson v. Parsons, 18 Ves. 173. It does not appear in what way the *modus* was laid in this case. Williamson v. Lord Lonsdale, 5 Price, 25.

In a subsequent case, however, Sir Thomas Plumer, M. R., on the authority of Travis v. Oxton, which he considered in point, held, that a *modus* of one penny, payable by every occupier of land in lieu of the tithe of hay, was bad; and he thought the cases of Travis v. Oxton and Bennett v. Read clearly distinguishable from each other, since, in the former case, the *modus* depending on the occupation of land, without reference to quantity, and being open to the possibility of being reduced to a single penny by the consolidation of farms, could not stand. In Bennett v. Read, the sum of twopence annually was payable by every householder, whether occupying land or not; it could not, therefore, be affected by consolidating the lands, but depended on the number of inhabitants.

Busk v. Lewis, Jacob R. 363.

The above case of Blackburn v. Jepson afterwards came before Lord Chancellor Eldon, on appeal from the Master of the Rolls, when his lordship, after argument and examination of the cases, reversed the decree, directing an issue; and, on the authority of Scott v. Fenwick, Travis v. Oxton, Williamson v. Lord Lonsdale, and Buske v. Lewis, held the *modus* to be bad; and his lordship distinguished the case of Bennett v. Read from that of Travis v. Oxton, on similar grounds to those assigned by Sir Thomas Plumer, M. R.

Blackburn v. Jepson, 3 Swanst. R. 123.‖

It has been holden, that a *modus* to deliver nine cart-loads of logwood in lieu of all tithes is certain enough.

Bunb. 279, Wolferston v. Manwaring; ‖Gwill. 679; 2 Eag. & Youn. 11.‖

The thing for which a *modus* is to be paid must likewise be certain.

The defendant in a suit for tithe insisted, that the inhabitants of a certain tenement had been accustomed to pay a sum of money as a *modus*, for the tithe of all corn grown upon the lands *usually enjoyed therewith*. The *mo-*

(R) Of a *Modus decimandi.*

dus was holden to be void for uncertainty; because the words *usually enjoyed therewith* imply, that the same lands had not been constantly enjoyed with the tenement.

2 P. Wms. 462, Carleton v. Brightwell.

‖A *modus*, in lieu of tithe of lambs, and of the wool of the first shearing of such lambs, *or* in lieu of tithe of such lambs, is ill pleaded, being alternative and uncertain.

Leech v. Bailey, 6 Price, 504.‖

[A *modus* of two-pence, payable by every householder or inhabitant in the parish for all tithe of fuel, of fruits, of agistment, and of wood, is good.

Bennett v. Read, Anstr. 322, n.] ‖See the cases of Travis v. Oxton, Williamson v. Lonsdale, Leyson v. Parsons, Busk v. Lewis, Blackburn v. Jepson, *suprà*.‖

It has been holden, that a *modus* for a farm is void; because a farm does not consist of any certain quantity of land.

Bunb. 129, Burwell v. Coates.

But if, in prescribing for a *modus* for a farm, the quantity of land of which the farm consists be specified, the *modus* is good.

Bunb. 160, Finch v. Malsters. [See Scott v. Allgood, Anstr. 16.]

And it is not necessary that the thing for which a *modus* is to be paid should be always described with certainty in prescribing for the *modus;* because, if from what is alleged the thing can fairly be ascertained, the *modus* is good, it being a maxim of law, that *certum est quod certum reddi potest.*

‖A *modus* for the parson to enjoy a certain meadow, and also various beast grasses, in the parish, in lieu of tithes, is void for uncertainty.

Birch v. Stone, Gwill. 649.

So is a *modus* for occupiers of certain ancient tenements to carry a cart-load of peat and turf from a certain place to the parsonage-house, for the use of the parson, on such a day, or within the space of every two years, as the parson should require the same, in lieu of tithe of hemp, flax, and hay arising on these tenements; for a cart-load is uncertain, and may be drawn by two or six horses; and there is no right of turbary in the parson alleged.

Tully v. Killner, Gwill. 644; and see Jenkinson v. Royston, 5 Price, 495, where various moduses were held bad for uncertainty.

Where defendants set up a *modus* of two-pence for each load of hay of the weight of one ton, payable at Easter by the several occupiers, in lieu of tithe of hay; and by their answer further stated, that the amount of the *modus* payable to the rector under such custom had been usually ascertained by a person on behalf of the rector inspecting the ricks of hay made within the parish in each year, and forming an estimate of the number of loads of one ton weight contained in each rick, upon which estimate the whole of the annual *modus* payable to the rector was calculated, but that this mode of estimating the weight formed no part of the custom, the *modus* was held bad for uncertainty; the time of weighing being uncertain, and there being a difference in the weight of old and new hay; and the Lord Chancellor Eldon refused an issue.

Goodenough v. Powell, 2 Russell, 219.‖

A *modus* to pay twelve-pence for every acre of upland, was holden to be good; because what is upland may be ascertained.

2 P. Wms. 572.

(R) Of a *Modus decimandi.*

The prescription was, that every person living out of a parish should pay fourpence for every acre of meadow or pasture, occupied by him in the parish. This was decreed to be a good *modus;* Lord King Chancellor, and Reynolds and Fortescue, the two justices who assisted him, being of opinion that it was certain enough; for that there is no great difficulty in ascertaining the number of acres of meadow or pasture occupied by a person in a parish.

2 P. Wms. 572, Chapman v. Monson; ‖S. C. *nom.* Chapman v. Bishop of Lincoln, Mos. R. 266, 279; Gwill. 679; 2 Eag. & Y. 17; and see this case cited by Thompson, B., 3 Anst. 638; Gwill. 1427.‖

A *modus* for a park is good, although the quantity of land of which it consists be not mentioned; for a park is sufficiently ascertained by its boundaries.

1 Roll. Abr. 651, pl. 3.

But if a park be disparked, the *modus*, unless the occupier of the disparked land allege that it is to be paid for a certain quantity of land, is void.

1 Roll. Abr. 651, pl. 4.

[A *modus* for every ancient orchard is good.

Anstr. 16.]

The time of paying what is to be paid as a *modus* must likewise be certain.

8 Mod. 375; Bunb. 105, 171, 173.

If the *modus* be to pay a sum of money yearly, in lieu of tithe, on or about the first day of May, this is not a good *modus*, because the time of payment is uncertain.

Bunb. 198, Blacket v. Finn.

The prescription was, to pay a sum of money as a *modus* for the tithe of sheep at Easter, or when the sheep shall be sold. The *modus* was holden to be void, by reason of the uncertainty of the time of payment.

Bunb. 173, Phillips v. Simes.

‖But it is held sufficient to state in *pleading* that a *modus* is payable *at or about* a particular day; and a *modus* may be established though proved to be payable at a different day from that laid in the bill.

Gwill. 802, 1268.

A *modus* for one penny for every turkey laying eggs, or every tenth egg laid by such turkey, at the option of the vicar, in lieu thereof, has been held void for uncertainty, as no certain time was given if the option were made to take it in money; and therefore, if there were a change of vicars, it would be uncertain to which it would belong.

Roberts v. Williams, 12 East, 33; Gwill. 1650; and see Scott v. Carter, 1 Young. & J. 452. But *quære*, whether it is not sufficient to state the *modus* as payable yearly, and supply the time by evidence? See 2 Eag. on Tith. 114, and cases there cited.

3. *Of a* Modus *which amounts to a Prescription in* Non decimando.

A *modus* to pay the tithe of part of a thing, which is tithable of common right, in discharge of the tithe of the whole thing, is void.

Cro. Ja. 47, Webb v. Warner, Ld. Raym. 677.

If the *modus* be, to pay the tithe of hay grown upon some lands, in discharge of the tithe of hay grown upon all other lands in the parish, the

(R) Of a *Modus decimandi.*

modus is bad; for, as it is only a recompense as to part, it amounts to a prescription *in non decimando* as to the residue of the hay grown in the parish.

A *modus* to pay the tithe of milk part of the year, in discharge of the tithe of milk for the whole year, was holden to be void; because it is, in effect, a prescription *in non decimando* as to milk for part of the year.

Ld. Raym. 360, Hill v. Vaux; Cro. Eliz. 609; Salk. 656; 12 Mod. 206; Bunb. 307.

But if the tithe of a thing, as of wood, be only due by custom, a *modus* to pay the tithe of part thereof, in discharge of the tithe of the whole, is good; because there may be a prescription *in non decimando* as to part of such a thing.

Salk. 656; Ld. Raym. 137; 12 Mod. 111.

If the tithe of part of a thing, which is tithable of common right, be by a *modus* made more valuable, the *modus*, although it is to be paid in discharge of the tithe of the whole thing, is good; because such *modus* may be a recompense for the tithe of the whole thing.

Hob. 250; Salk. 656; 12 Mod. 206; Ld. Raym. 360; 2 P. Wms. 521.

A *modus* to pay the tenth cheese from the first day of May until the first day of August, in discharge of the tithe of milk for the whole year, is good; because, by the labour of making it into cheese, the tithe of milk is made more valuable so long as it is paid.

Cro. Eliz. 609, Austin v. Lucas.

A *modus* to pay a quantity of a thing, which is tithable of common right, in discharge of the tithe of the whole thereof, which a man may happen to have, is a good *modus.*

A *modus* to pay thirty eggs of the produce of a man's own hens, in discharge of all tithe of eggs, would be void; for, as thirty eggs may not be the tithe of all the eggs a man has, such a *modus* may amount to a prescription *in non decimando* as to some eggs.

Ld. Raym. 360, Hill v. Vauxin; ‖5 Price, 512.‖

But a *modus* to pay thirty eggs, in discharge of the tithe of all the eggs a man may happen to have, is good; for these eggs, which are not to be considered as tithe, must be paid at all events, whether the person who is to pay them have hens or not.

1 Roll. Abr. 648, pl. 3; Ld. Raym. 360.

A *modus* for the tithe of one thing, which is tithable of common right, can never be a discharge of the tithe of another thing, which is likewise tithable of common right.

The *modus* was, to pay one penny for every mare; and it was alleged, that this was to be a satisfaction for the tithe of horses, mares, and colts. This *modus* was holden to be void; because a *modus* for one thing which is tithable of common right, it being in fact only a recompense for the tithe of that thing, can never be a recompense for the tithe of another thing which is likewise tithable of common right; and, consequently, such *modus*, which amounts to a prescription *in non decimando* as to the other thing, is void.

Cro. Eliz. 446, Grysman v. Lewes.

4. *Of a* Modus *which has not been constantly paid.*

It is laid down, that if a *modus* have not been constantly paid it is destroyed.

Salk. 656, The Archbishop of York v. The Duke of Newcastle.

(R) Of a *Modus decimandi.*

And it has been holden in one case, that if a *modus* be for the tithe of hay grown upon a certain piece of land, and the land be converted into arable land, the *modus* is destroyed.

1 Roll. Abr. 651, Sharp v. Coult.

But it is in other cases laid down, that although the payment of a *modus* be suspended or cease for a time, it may be revived again.

In one case, the contrary to what was holden in the case of Sharp and Coult is laid down expressly; for it is laid down, that if there be a *modus* for the tithe of hay grown upon a certain piece of land, the *modus* is only suspended by converting the land into arable land, and revives again whenever hay is grown thereupon.

Godb. 194, Brown's case. ‖1 Eag. & Y. 203; Gwill. 982; and see Cart v. Hodgskin, 3 Swanst. 160; Gwill. 815; 3 Eag. & Youn. 1241.‖

In another it is laid down, that if an orchard, for which there is a *modus*, be disorcharded, the *modus* is suspended; but that, whenever the same ground is again converted into an orchard, the *modus* is revived.

1 Roll. R. 121, Hooper v. Andrews.

In another it is laid down, that a *modus* is not destroyed by the payment of tithes in kind for some years.

2 Bulstr. 240, Price v. Mascal.

And the doctrine of these three cases is adhered to, and confirmed in a modern case.

2 P. Wms. 572, Chapman v. Monson, Hil. 3 G. 2.

5. *Of a leaping* Modus.

It is not, as has been already observed, necessary that a *modus* should have been constantly paid, yet a *modus* must, when paid, have been constantly paid in the same manner; otherwise it is called a leaping *modus*, and is therefore void.

1 Eq. Ca. Abr. 369.

The *modus* was, to pay a certain sum of money for the tithe of certain premises, whilst they continue in certain hands; but if the premises should come into other hands, then the said sum or tithes in kind were to be paid at the election of the parson. This *modus* was holden to be bad. And by the court—There cannot be a leaping *modus*.

Select Ca. in Chan. 52, Webber v. Taylor; ‖Gwill. 656; 1 Eag. & Y. 802.‖

6. *Of a* Modus *which is too rank.*

Wherever the sum of money, or other thing paid as a *modus*, is of greater value than it can be fairly supposed the tithes for which it is paid were at the time of its commencement worth, such *modus*, which is called a too rank *modus*, is void.

A prohibition was refused because the *modus* appeared to be too rank. And by Holt, C. J.,—Wherever a *modus* runs too high, the presumption is strong that it is not a *modus*.

11 Mod. 60, Startup v. Dodderidge, Pasch. 4 Ann.

In a case about two years after the contrary was laid down.

The *modus* appearing too rank, it was decreed by the Court of Exchequer to be a temporary composition, and not a *modus:* but the decree was reversed; for churches may have been endowed with more than the value of the tithes.

Vin. Abr. tit. *Dismes*, D, a, pl. 47; Pole v. Gardiner, Mar. 5, 1707.

(R) Of a *Modus decimandi.*

But it has been since holden in divers cases, that a *modus* which is too rank is void.

In one case, a *modus* of five shillings for every acre of wheat was holden to be void, as being too rank; because five shillings is very near, if not quite, the value of the tithe of an acre of wheat at this day.

Bunb. 10, Benson v. Watkins, Hil. 3 G. 1.

‖One shilling and sixpence, and two shillings and sixpence, an acre for tithe, have been severally held void as too rank.

Heaton v. Cook, Wightw. 281; 2 Eag. & Youn. 610.‖

In another, a *modus* of one shilling for a milch cow was holden to be void, because it is too rank. And by the court—A shilling was, at the time this *modus* must be supposed to have had its commencement, half the yearly value of the milk of a cow.

Bunb. 78, 79, ‖Franklyn v. The Master of St. Cross.‖

And in the same case, a *modus* of sixpence for a calf was holden to be too rank.

The reporter of this case does indeed say, in a note, that since this case a *modus* of sixpence for a calf has been holden to be good.

And in another case, not two years before that of Bennet v. Jenkins,(*a*) a *modus* of eleven-pence for a milch cow, and one of sixpence for a calf, were both holden to be good.

Bunb. 57, Roe v. The Bishop of Exeter, Hil. 6 G. 1; ‖Jenkinson v. Royston, 5 Price, 495; Gwill. 1878; Holwell v. Blake, M'Clell. 559. (*a*)This case is Franklyn v. The Master, &c., of St. Cross; Bennet their lessee, and Jenkins the vicar, &c. The report in Bunb. 78, seems not much to be relied upon.‖

It may, upon comparing the two last cases, be doubtful whether a shilling be too rank a *modus* for a milch cow, and sixpence for a calf: but they both confirm the doctrine, that a *modus* which is too rank is void; for the two questions, Whether a particular *modus* be too rank, and whether a *modus* which is too rank be void, are quite distinct and independent of each other.

‖In a late case, where a *modus* of one shilling for every milch cow, in lieu of the tithe of milk of such cow, was set up, the Court of Exchequer directed an issue on the *modus*.

Leathes v. Newitt, 4 Price, 355. It appears the occupiers succeeded on the issue. 8 Price, 562; and see Tennant v. Wilsmore, 4 Wood, 481, *acc.* In Busk v. Lewis, Jacob. 363, Sir Thomas Plumer, M. R., overruled a *modus* of one shilling for a milch cow, in lieu of tithe of milk, as too high.

A *modus* of three-pence a year for every cow, and sixpence for every calf, in lieu of tithes of cows, calves, and milk, is good.

Prevost v. Bennett, 2 Price, R. 272.

So, a custom to pay for every foal one penny, and for every milch cow two-pence, and for every heckforth, or heifer that had had but one calf, one penny, in lieu of milk and all profit arising from such cow or heifer, except the calf, is good.

Jenkinson v. Royston, 5 Price, 495; Gwill. 1878.

A *modus* of one shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, was held rank.

Layng v. Yarborough, 4 Price, 383.

A *modus* of one shilling for every seventh pig, on the ninth day, was held good after some doubt.

Bertie v. Beaumont, 2 Price, 303.

(R) Of a *Modus decimandi.*

But, in a later case, a *modus* of one shilling for every tenth pig, in lieu of tithe of such pig, was held rank, and also objectionable; because nothing was stated to be payable for the numbers above or below ten.

Layng v. Yarborough, 4 Price, 383; Gwill. 1841.

A *modus* of one shilling for every tenth fleece, in lieu of the tithe of the ten fleeces, was adjudged void by the Court of Exchequer, as being rank.

Layng v. Yarborough, 4 Price, 383; Gwill. 1841. See Eag. on Tith. 356, *notâ.*

A *modus* of three-pence for a lamb, in lieu of tithe of lambs, has been held not rank.

Bertie v. Beaumont, 2 Price, 303; and see Layng v. Yarborough, *ubi suprà;* Drake v. Smith, 5 Price, 369; and see Askew v. Greenhow, 2 Price, 314.

A *modus* of eight-pence for every colt has been established by the Court of Exchequer.

Hockmore v. Richards, 1 Wood, 485; 1 Eag. & Youn. 681.

So, *moduses* of one penny for every brood of goslings not exceeding five, and two-pence for every brood above that number and under ten; (*a*) of one farthing for every goose and gosling under seven; (*b*) of three halfpence for every goose, where they do not amount to a tithable number, and tithes in kind where they do; (*c*) a young goose with the feathers, payable on the first of August, in lieu of all tithes of geese and feathers; (*d*) a custom to pay geese in kind, to be delivered before Midsummer; and if there be less than seven geese, for every goose a halfpenny; and if there be seven and under ten, to pay one, and be allowed a halfpenny for each goose wanting to make up the number of ten, and so for any odd number of geese; (*e*)—have been severally adjudged good moduses.

(*a*) Popplewell v. Canby, 2 Wood, 390. (*b*) Isaack v. Portbury, E. 1711; 1 Wood, 525; 1 Eag. & Y. 697. (*c*) Boscawen v. Roberts, 5 Wood, 174; 2 Eag. & Y. 228; Gwill. 946. (*d*) Huit v. Hill, 3 Keb. 705; 1 Eag. & Y. 511. (*e*) Jenkinson v. Royston, H. 1818; 5 Price, 495; 3 Eag. & Y. 96; Gro. 1878.‖

[A *modus* of five shillings an acre for all land sown with wheat, in lieu of all tithes of wheat, is too rank. So, of two shillings and sixpence an acre for all land sown with other grain, in lieu of all tithe of such grain. So, of two shillings an acre for all meadow mowed, and one shilling and four-pence for upland grass-ground mowed, in lieu of all tithes of grass and pasture. So, of two shillings and sixpence for every farrow of pigs littered, in lieu of all tithes of them. So, of eight shillings a score of lambs, in lieu of the tithe of lambs. So, of one penny a fleece of all wool shorn in the parish, in lieu of all tithe wool.

Torriano v. Legge, 1 Bl. R. 420; 2 Rayn. 519.]

The court will not decree against a farm *modus* on the ground of *rankness:* for there is a very material difference between a farm-payment, and one for a particular species of produce. In the former, many reasons may have prevented the tithes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman; or he may have wished to pay for an exemption from tithes for the sake of improvements. Besides, it is hardly possible to ascertain the comparative value of the land, or of the produce, in former times: and the court should not be nice in judging of the value or the goodness of the bargain, where, by any probable circumstances, the *modus* may have been a real agreement between the parties before time of memory. More especially will they be extremely cautious

(R) Of a *Modus decimandi.*

in deciding such a question without the intervention of a jury, if the least doubt arise as to the fact of rankness.

Atkyns v. Lord Willoughby de Broke, Anstr. 402.

‖Where the rankness of a *modus* is apparent on the face of it, a court of equity will decide against it, without directing a trial at law, although the question of rankness is purely one of fact, and not of law; as where the amount of the moduses appeared to be equal to the tithes in kind demanded by the bill. So, also, Lord Hardwicke, in one case, said he should be ashamed to send it to a jury, to try a question of *modus* of thirty pounds per annum, where the whole value of the tithes did not exceed sixty pounds; and he decreed accordingly for the parson, with costs.

Gwill. 1058, 1192, 1238, 1320, Moore v. Beckford, cited 2 Bl. R. 1257.

But the cases where the court of equity has allowed the objection of rankness, without the intervention of a jury, are principally with reference to the value of particular things for which the *modus* has been set up; as where it is so much for a sheep or lamb, or a particular kind of product, the value of which may be shown at those times: but moduses depending on the *value of lands* at particular times, present a much more complicated question; since such value varies by different means, by fluctuations of traffic and commerce, by improvements in cultivation, by accidental rise or depreciation, and various other circumstances, which render such moduses more uncertain, and consequently more fit subjects for the investigation of a jury.

Chapman v. Smith, Gwill. 847; O'Connor v. Cook, 6 Ves. 665; 8 Ves. 535; Gwill. 1624; and see Toll. on Tithes, 204, 205; 2 Eag. on Tith. 190.‖

7. *Of a* Modus *which is liable to Fraud.*

A *modus* of one penny for the tithe of all hay arising upon a farm being prescibed for, it was objected, that the *modus* is liable to fraud; for that all the land may be turned into meadow, and then only one penny will be paid for the tithes of the whole farm: but the *modus* was holden to be good.

Bunb. 162, Finch v. Masters; ‖Gwill. 652; vide *antè*, p. 53. It seems doubtful whether the word "hay," in some of the moduses of "hay-penny," does not mean something quite distinct from tithe of hay. 2 Eag. on Tith. 81, note.‖

The *modus* was, that every person who lived out of a parish should pay four-pence for every acre of meadow or pasture occupied by him in the parish. It was objected, that such a *modus* is liable to great fraud; for that many persons would live out of the parish to avoid paying tithes in kind; and others would, by threatening to leave the parish if he did not do it, compel the parson to take less than the worth of his tithes. It was answered, that if the being liable to fraud is an objection to the goodness of a *modus*, scarce any *modus* will be good, because every one is in some degree liable to fraud. The *modus* was holden to be good.

2 P. Wms. 569, 571, 572, Chapman v. Monson; ‖S. C. *nom.* Chapman v. Bishop of Lincoln, Mos. R. 266; Gwill. 679; 2 Eag. & Y. 11.‖

8. *Of a* Modus *for such Persons as live out of the Parish.*

It has been holden, that a *modus* for such persons as live out of the parish is unreasonable; for that the inhabitants of the parish, as being liable to

the charge of the repairs and vestments of the church, ought to be most favoured in the payment of tithes.

1 Lev. 116, Bawdry v. Bushell.

But in a modern case such a *modus* was holden to be good; and the opinion of the court, in the case of Bawdry v. Bushell, is not only said to have been a hasty one, but the ground of it, namely, that only parishioners are liable to the charges of repairs and vestments of the church, is expressly denied to be law.

2 P. Wms. 567, 574, Chapman v. Monson; ‖S. C. *nom.* Chapman v. Bishop of Lincoln, Mos. R. 266; Gwill. 679; 2 Eag. & Y. 11.‖

9. *Of the Extent of a* Modus.

A *modus* for a garden extends only to the ancient ground of the garden; for, if more ground be laid to the garden, the *modus* does not extend thereto.

Bunb. 79, Perrot v. Markworth.

If a *modus* be to pay at the rate of a certain sum by the acre for the tithe of all hay grown in the parish, the *modus* extends to clover, saintfoin, and all other things of the grass kind, although the cultivation of some of these has been lately introduced into the parish.

Lutw. 1074; Bunb. 79, 344.

But if a *modus* be for the tithe of all hay grown in the parish, or for the tithe of all hay grown upon a particular farm in the parish, the *modus* extends only to the ancient meadow of the parish or farm.

Fitzgib. 53, Fox v. Aide.

It has been holden, that if a mill be erected upon a piece of land, for which there is a *modus*, the *modus* extends to the mill.

1 Roll. Abr. 651, Russel v. More, Trin. 39 Eliz.

But this case does not seem to be law; for in a later case it was holden, that a mill, although it be erected upon land discharged of tithes, is liable to the payment of tithe.

Cro. Ja. 429, Anon., Trin. 15 Ja. 1. ‖See C. B. Dodd's MS. 204; 1 Eag. & Y.; Talbot v. May, 3 Atk. 17; Gwill. 782; 2 Eag. & Y. 93; and see 1 Eag. on Tith. 396.‖

‖Where a mill was erected on land discharged by an enclosure act from all small tithes payable in respect thereof, it was held, that the mill was exempted from tithes under the act.

Gaches v. Haynes, Gwill. 1256; 4 Wood, 588; 3 Eag. & Y. 1326.‖

If there be a *modus* for a mill, in which there has always been but one pair of stones, and a second pair of stones be added to the mill, the *modus* extends to these.

4 Mod. 45. Grimley v. Falkingham. ‖See 3 Atk. 17; 3 Ves. & B. 71.‖

If the stream of a mill, for which there is a *modus*, be by the act of God changed from its usual course, and afterwards the owner pull that mill down, and erect a new mill upon the new stream, the *modus* extends to the new mill.

1 Roll. Abr. 641, pl. 1.

But if the stream had been changed by the act of the owner, the new mill would have been liable to the payment of tithe.

1 Roll. Abr. 641, pl. 1.

(S) Of a Prescription in *Non decimando.*

‖Where a defendant in a tithe suit set up a farm *modus*, and an issue was directed to try whether the ancient farm consisted of the lands mentioned in the answer, and whether a certain *modus* had been immemorially payable for the tithes arising upon it; and the jury found that the farm consisted of those lands, together with four other closes, and was covered by a *modus:* the circumstance of the farm consisting of other lands than those mentioned in the pleadings, was held no ground for a new trial, unless the plaintiff could show that he had evidence respecting those four closes, which, on the supposition that they were parcels of the alleged ancient farm, might materially vary the substance of the case.

Bailey v. Sewell, 1 Russ. R. 239.‖

(S) Of a Prescription in *Non decimando.*

A SPIRITUAL person may prescribe *in non decimando;* because every such person was, at the common law, capable of receiving a grant of tithes.

1 Roll. Abr. 653; Cro. Eliz. 206, 216, 511; Cro. Car. 423.

Another, and the principal reason, is, that the church does not lose any thing by such prescription; a spiritual person having the benefit thereof.

The churchwardens of a parish, although they hold land for repairing the church, cannot prescribe *in non decimando* for the land; because they are not spiritual persons.

1 Roll. Abr. 653, pl. 6.

If a layman be tenant for years, to a spiritual person, of land which is discharged of tithes, he may prescribe *in non decimando* for the land; because, as the possession of the tenant is in point of law the possession of the landlord, the prescription in this case would be in the right of a spiritual person.

1 Roll. Abr. 653, pl. 4; Cro. Eliz. 216, 512, 785; Moor. 219.

But if a spiritual person grant an estate of inheritance in land, for which the spiritual person might himself have prescribed *in non decimando*, to a layman, the grantee cannot prescribe *in non decimando;* because the prescription would be in his own right.

Cro. Car. 423; Hardr. 315; 2 Keb. 29; 1 Sid. 320.

It has, however, been holden, that a layman, who holds land by copy of court-roll of a manor discharged of tithes, may prescribe *in non decimando* for the land, although he has an estate of inheritance therein.

Cro. Eliz. 784; Crouch v. Fryer, Yelv. 2; ‖Gwill. 218; 1 Eag. & Y. 167. See Monck v. Huskisson, Simon's R. 280.‖

A layman may prescribe *in modo decimandi*, but he cannot prescribe *in non decimando*, for any thing which is tithable of common right; because a layman was not, at the common law, capable of receiving a grant of tithes; and it has been holden in favour of the church, that the right of tithes cannot be taken away, unless an actual recompense be paid for the same, or unless the instrument by which the land has been thereof discharged be produced.

11 Rep. 13; 1 Roll. Abr. 653; Cro. Eliz. 293, 512, 599, 763; Hob. 296; 2 P. Wms. 573.

It has been holden, in two modern cases, that a layman can no more

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prescribe *in non decimando* against an impropriator than against a rector; for that both are equally entitled of common right to tithes.

Bunb. 325, Charlton v. Charlton; Ibid. 345, The Corporation of Bury v. Evans.

‖This doctrine, which has been frequently doubted, and regretted, by able judges, is now completely established as law; and it is settled, that evidence of long and uninterrupted retainer of tithes by a layman can no more raise a presumption of grant as against a lay impropriator than against a spiritual rector. In Fanshaw v. More, Gwill. 781, B. Clarke observed, that though the authorities against such a prescription were great, the reason of them grew weaker every day. Before the Reformation, all tithes were ecclesiastical; and a layman could have tithes by way of discharge only, by grants of parson, patron, and ordinary. Since that time, there were many other ways both of having tithes, and being discharged from them. Since tithes have been in the hands of lay impropriators, many persons have purchased discharges for their particular lands: yet if these grants are lost, by the common fate of things, those persons must lose the benefit of their purchases. It is very hard that time, which strengthens all other rights, should weaken this. Lord Loughborough, in an extra-judicial opinion, expressed himself strongly against the doctrine in Rose v. Calland, 5 Ves. J. 186, as did C. B. Macdonald in Petre v. Blencoe, 3 Anst. 945; and Lord C. Eldon, in Berney v. Harvey, 17 Ves. 127, observed, that there was a decision against it in the Court of Exchequer in 1727; and that both Lord Talbot and Lord Hardwicke had struggled against it; and in Meade v. Norbury, 2 Price, 347, Wood, B., strongly controverted it. The courts, however, have decided, that it is too firmly settled to be now overthrown.

Fanshaw v. Rotheram, 1 Eden, R. 276, 302, note (a); Nagle v. Edwards, Gwill. 1442; Berney v. Harvey, 17 Ves. 119; Heathcote v. Aldridge, 1 Madd. 236; Meade v. Lord Norbury, 2 Price, R. 338.

To establish a grant from a lay impropriator, it is not, however, necessary to produce it; it is sufficient to prove that such a grant did in fact exist.

Ibid.; and see Gwill. 1345; 1 Price, 253.

There is, however, a settled distinction between mere non-payment of tithes (which amounts only to *non decimando*,) and actual pernancy and possession of them, separate from and independent of any interest in the land. In the former case the possession has been unlawful, and the court can pay no regard to the length of it; in the latter, the title is not unlawful, and long possession may therefore raise a presumption of grant.

Scott v. Airey, Gwill. 1174; Strutt v. Baker, 2 Ves. J. 625; Heathcote v. Aldridge, 1 Madd. 236; and see 1 Eden, R. 303, note; Bacon v. Williams, 1 Sim. & Stu. 415; 3 Russell, 525.‖

It is said to have been holden in one case, that the inhabitants of two hundreds may prescribe *in non decimando*, for a thing which is tithable of common right.

1 Roll. Abr. 654, Kidden v. Edwards, Pasch. 15 Car. 1. ‖This was a claim not to pay tithe of grain ground by a common baker *in his trade;* and on this ground he would seem exempted from tithe at common law without any prescription. See Gwill. 974; 3 Wood, 285; 2 Eag. & Y. 240; Wightwick, 15; Gwill. 1653; 1 Eag. on Tith. 400.‖

But in a subsequent case it is laid down, that neither of the inhabitants of two hundreds, nor of a whole county, can prescribe *in non decimando* for a thing which is tithable of common right; and it is added, that as no

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single inhabitant of a hundred or county can in such case prescribe *in non decimando*, it would be absurd to hold, that all the inhabitants of a hundred or county may.

Ld. Raym. 137; Hicks v. Woodson, Hil. 8 W. 3; 12 Mod. 111; Salk. 655. ‖See Nagle v. Edwards, 3 Anst. 702; Gwill. 1442; Smith v. Johnson, Gwill. 606; Page v. Wilson, 2 Jac. & W. 513.‖

It is indeed true, that a prescription *in non decimando* for wood by the inhabitants of a hundred has been holden good; but no inference can be drawn from hence; because tithe of wood, which does not renew annually, is not due of common right, for in ancient times it was only paid in particular places by custom.

Ld. Raym. 137; 12 Mod. 111; Salk. 656; Comb. 404. ‖It is settled, that such a prescription is good; but it can only be claimed by a well-known division of the country. See Nagle v. Edwards, 3 Anst. 702; Page v. Wilson, 2 Jac. & W. 513; Chichester v. Sheldon, 1 Turner, 245; and it seems a liberty cannot so prescribe. Johnson v. Bois, Gwill. 373; 3 Eag. & Y. 1210.‖

(T) Of a Discharge of Tithes by Grant.

A LAYMAN was not, at the common law, capable of receiving a grant of tithes.

1 Rep. 45; 11 Rep. 13; Cro. Eliz. 293, 599, 763; Hob. 296.

But the land of a layman could, at the common law, have been discharged of tithes by grant, provided the parson, patron, and ordinary were all parties thereto.

2 Rep. 44, Bishop of Winchester's case.

And a discharge of tithes by such grant, in case it were obtained before the restrictive statutes, is at this day good.

2 P. Wms. 573, Chapman v. Monson; Cro. Car. 423.

A layman cannot avail himself of a discharge of tithes by grant, unless he produce the deed of grant; for if this be not produced, tithes must be paid, although none have been paid within time of memory; because a layman cannot prescribe *in non decimando*.

2 P. Wms. 57, Chapman v. Monson; 11 Rep. 13; 1 Roll. Abr. 653; Cro. Eliz. 293, 512, 599, 763; Hob. 296. ‖It is sufficient to give evidence of the existence of such a grant without producing it. 1 Eden, R. 302, note (*a*); 1 Price, 253.‖

(U) Of a Discharge of Tithes by Bull.

SPIRITUAL persons heretofore frequently purchased bulls from the pope, for discharging their lands of the payment of tithes.

2 Inst. 652, 653.

The practice of doing this seems to have been more prevalent after the ordinance of Pope Pascal the Second, by which it was ordained, that only the lands of the Cistercians, Hospitallers, and Templars, should be exempted from the payment of tithes.

Cro. Ja. 454; 2 Rep. 44.

It was the opinion of Coke, C. J., that the pope never had the power of discharging any land, belonging to a subject of this realm, of the payment of tithes.

2 Inst. 653.

For the sake of removing all doubt as to this, and of putting a stop to the practice of purchasing bulls for discharging land of the payment of

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tithes, it is by the 2 H. 4, c. 4, after reciting that the order of the Cistercians in this realm had purchased certain bulls, to be discharged of the tithes of their lands let to farm, enacted, "That the religious of the order of Cistercians shall be in the state they were in before such bulls were purchased; and that if they of the said order, or any other, religious or seculars, of whatsoever state or condition they be, do put the said bulls in execution, or do from henceforth purchase other such bulls; or by colour of the same bulls, purchased, or to be purchased, do take advantage in any manner, a writ of *præmunire facias* shall go against them."

(W) Of a Discharge of the Payment of Tithes by Order.

In ancient times, monks of all orders were discharged of the payment of tithes.

But as monks, in process of time, increased to a great degree, and had such large possessions, that holy church was thereby greatly impoverished, *et filia devoravit matrem*, Pope Pascal the Second ordained, that monks' orders, except the Cistercians, Templars, and Hospitallers, or of St. John of Jerusalem, should be liable to the payment of tithes.

Cro. Ja. 454; 2 Rep. 44; Cro. Ja. 57; 2 Inst. 652.

This ordinance being found insufficient to prevent the impoverishment of the church, another was some time after made by Pope Adrian the Fourth; by which even the lands of those three orders, except the lands *quæ propriis manibus excoluntur*, were rendered liable to the payment of tithes.

2 Rep. 44; Cro. Ja. 454; 2 Inst. 652; Cro. Ja. 57.

The privilege of being discharged of tithes extended only to such lands as those three orders were possessed of about the year 1200; for all parochial tithes being at that time appropriated to the persons who had the cure of souls in the respective parishes, it followed that if land in a parish were afterwards granted to either of these orders, it would be liable to the payment of tithes.

‖It extends only to such lands as the three orders were possessed of at the time of the last general council of Lateran, in the seventeenth year of King John, 1215; the exemption being granted by the council, and allowed by the general consent of the realm. 2 Inst. 651; Stavely v. Ullithorne, Hard. 101.‖

‖The privilege of exemption was also granted, by Pope Innocent the Third, in the year 1198, to the order of Premonstratenses (canons of St. Austin, who established their order at Premonstratum in Picardy;) and the privilege appears to have been allowed in the twelfth year of Edward the Third, and a decree made accordingly: but it is now clearly settled, that as this bull of exemption was never received as law in England, like the privilege granted to the other orders by the council of Lateran, a title to exemption cannot be derived from the possession of lands of this order.

Dickenson v. Greenhill, Gwill. 409; Townley v. Tomlinson, Gwill. 1004, 1017; Toller, 171.‖

As a discharge of tithes by order was personal, every such discharge must, upon the dissolution of the religious houses to whose persons it was annexed, have been at an end, if it had not been continued by one or more statutes.

Cro. Ja. 608, Gerrard v. Wright.

By the 31 H 8, c. 13, § 21, it is enacted, "That the king, his heirs

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and successors, and every person, his heirs and assigns, which hath, or hereafter shall have, any manors, lands, tenements, or other hereditaments whatsoever, which belonged, or now belong, unto any monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other religious and ecclesiastical houses or places, shall have, hold, and enjoy the said manors, lands, tenements, and other hereditaments whatsoever, and every of them, discharged and acquitted of the payment of tithes, as freely, and in as ample a manner, as the said late abbots, priors, abbesses, prioresses, and other ecclesiastical governors and governesses, or any of them, had, held, occupied, possessed, or enjoyed the same, or any parcel thereof, at the days of their dissolution, suppression, renouncing, relinquishing, forfeiting, giving up, or coming to the king's highness, of such monasteries, abbathies, priories, nunneries, colleges, hospitals, houses of friars, or other religious or ecclesiastical houses or places, or any of them."

By this statute, the privilege of being discharged of tithes, which the monks of the order of Cistercians, Templars, Hospitallers, or of St. John of Jerusalem, had enjoyed for all the lands *quamdiu propriis manibus excoluntur*, which they were possessed of before the appropriation of parochial tithes, was continued to such of these lands as were thereby vested in the crown.

Cro. Ja. 57, 608; Cro. Car. 24; Hob. 306.

It has been holden, that if land, heretofore discharged by order of tithes, be at this day discharged of tithes, a right of common, either appendant or appurtenant to the land, is likewise discharged thereof.

Bunb. 138, Lambert v. Cumming. ‖So, also, under a grant of the tithes arising out of farms, lands, &c., the tithes arising in respect of rights of common appurtenant to such farms or lands will pass; and, consequently, allotments awarded under an enclosure act, in respect of such rights of common, are tithe free. Lord Gwydyr v. Foakes, 7 Term R. 641; Steele v. Mans, 5 Barn. & A. 22; and see Stockwell v. Terry, 1 Ves. 117; Moncaster v. Watson, 3 Burr. 1375; White v. Lisle, 4 Madd. 214; Gwill. 1920.‖

Evidence of a great tithe having been paid for land, whilst it was in the hands of the monks of an order capable of a discharge of the payment of tithes, is the best evidence which can at this day be given, that the monks were not possessed of the land before the appropriation of parochial tithes.

Bunb. 122, Lord v. Turk. ‖See Donnison v. Elsley, 1 M'Clel. & Y. 24; Carysfort v. Wells, Ibid. 606. However, proof of payment of tithe by the land-owners will not destroy the exemption *ratione ordinis*, if it is clearly proved that the lands belonged to the monastery before the council of Lateran; for the abbot or prior could not permanently dispense with the privilege by any agreement to pay tithe. Stavely v. Ullithorne, Hard. 101; 1 Wood, 24; Gwill. 502.‖

But evidence of the payment of a small tithe for land, whilst it was in the hands of the monks of an order capable of a discharge of the payment of tithe, is not evidence of this; because lands discharged by order were only discharged of the payment of great tithes.

Clayt. 53, pl. 92.

A tenant for life of land which was discharged by order of the payment of tithes at the time of the dissolution of the religious house to which it belonged, is not at this day discharged of the payment of tithes; for the construction of the 31 H. 8, c. 13, has always been, that the privilege of being thereby discharged of the payment of tithes, is only continued to those who have an estate of inheritance in the land.

Hardr. 174, 190; Wilson v. Redman, Clayt. 53.

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‖ It has been since decided, that a tenant for life under a settlement is entitled to such discharge. *Quære*, as to a mere lessee for life?

Hett v. Meads, Gwill. 1515; 3 Eag. & Y. Ca. 1384.‖

It was found by a special verdict, that the lands in question, heretofore belonging to an abbey of the Cistercian order, were discharged of the payment of tithes *quamdiu propriis manibus excoluntur;* that these lands were in lease for years at the time of their being vested in the crown by the 31 H. 8, c. 13, and that the lease was now expired: and the question was whether the grantee in fee of the crown should be discharged of the payment of tithes *quamdiu propriis manibus excoluntur?* It was holden, that he should: and by the court—Although the tenant for years paid tithes for the lands at the time of the dissolution of the abbey; yet as the abbot would have holden them, in case the lease thereof had expired before the dissolution, discharged of the payment of tithes *quamdiu propriis manibus excoluntur*, the grantee of the crown ought to hold them in the same manner.

Cro. Ja. 559, Porter v. Bathurst, Cro. Ja. 454; Hardr. 190; ‖Cowley v. Keys, Gwill. 1308.‖

By the 27 H. 8, c. 28, § 1, all religious and ecclesiastical houses, whose possessions were not of the value of more than two hundred pounds a year, were to be dissolved; and the lands, tenements, tithes, and other hereditaments of such religious and ecclesiastical houses were to be vested in the crown.

And by § 2, it is enacted, "That every person who now hath, or hereafter shall have, any letters patent of the king's highness of the lands, tenements, tithes, or other hereditaments which appertained to any religious house heretofore dissolved, or which appertaineth to any religious house that shall be suppressed or dissolved by the authority of this act, shall have and enjoy the said lands, tenements, tithes, and other hereditaments, specified in their letters patent, in like manner, form, and condition as the abbots, priors, abbesses, prioresses, and other chief governors, had or ought to have the same, if they had not been suppressed or dissolved."

It has been frequently determined, that no land, heretofore discharged by order of the payment of tithes *quamdiu propriis manibus excoluntur*, which in pursuance of this statute was vested in the crown, is discharged of the payment of tithes.

Hob. 306; Cro. Ja. 57, 608; Cro. Car. 24.

There is in the 31 H. 8, c. 13, a clause in the third paragraph to the same effect, concerning the lands of religious houses thereby vested in the crown: but it is plain, from a subsequent clause in the twenty-first paragraph of the 31 H. 8, c. 13, by which such lands are discharged of the payment of tithes, that the legislature were sensible that such lands were not discharged thereof by the former clause; for if they had been thereby discharged, the inserting of another clause of discharge would have been altogether nugatory.

By the twenty-first paragraph of the 31 H. 8, c. 13, only such lands, heretofore discharged by order of the payment of tithes *quamdiu propriis manibus excoluntur*, are discharged of the payment of tithes as came to the hands of Henry the Eighth, *after the fourth day of February*, in the twenty-seventh year of his reign.

In consequence of this, it has been holden, that no lands, heretofore dis-

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charged by order of the payment of tithes *quamdiu propriis manibus excoluntur*, which were vested in the crown in pursuance of the 27 H. 7, c. 28, were discharged of the payment of tithes by the 31 H. 8, c. 13; for as the lands vested in the crown by the former of these statutes, were by relation vested *upon the fourth day of February*, in the twenty-seventh year of the reign of King Henry the Eighth, that being the first day of the session of parliament in which the 27 H. 8, c. 28, was made, the latter statute cannot extend to those lands.

Hob. 306; Cro. Ja. 57, 608; Cro. Car. 24.

It has been holden in two cases, that lands heretofore discharged by order of the payment of tithes *quamdiu propriis manibus excoluntur*, which were vested in the crown by the 32 H. 8, c. 24,(*a*) are not at this day discharged of the payment of tithes.

2 Rep. 46, The Archbishop of Canterbury's case, Trin. 38 Eliz.; Cro. Ja. 58, Cornwallis v. Spalding, Hil. 44 Eliz. ‖(*a*) These were the possessions of the order of St. John of Jerusalem.‖

As there is no discharging clause in this statute, such lands must, if they are discharged of the payment of tithes, be discharged by the 31 H. 8, c. 13.

2 Rep. 46, The Archbishop of Canterbury's case.

It appears, indeed, upon comparing the discharging clause in the twenty-first section of the 31 H. 8, c. 13, with the third section of the same statute, that the discharge extends to the lands of religious houses "which thereafter shall happen to be dissolved, suppressed, renounced, relinquished, forfeited, given up, *or by any other means come to the king's highness*." But the construction in one of the cases was, that the words, *or by any other means come to the king's highness*, do not include a coming by act of parliament; for if the legislature had intended to include a coming to the king by act of parliament, this, which is the highest way of coming, would have been mentioned before the coming by dissolution, or by the other inferior ways which are therein particularly mentioned. And in support of this construction, a case was relied on, in which it had been holden, that bishops are not included under these words of the 13 Eliz. c. 10, "Colleges, deans and chapters, parsons, vicars, and others having ecclesiastical livings;" because as persons of an inferior rank are expressly mentioned, bishops, if it had been intended to include them, would have been likewise expressly mentioned.

But it has been holden in a subsequent case, by three judges against one, that lands heretofore discharged by order of the payment of tithes *quamdiu propriis manibus excoluntur*, which were vested in the crown by the 32 H. 8, c. 24, are at this day discharged of the payment of tithes; for that the words in the third paragraph of the 31 H. 8, c. 13, *which thereafter shall happen to be dissolved*, include every kind of dissolution, and consequently a dissolution by act of parliament; and that the words, *or by any other means come to the king's highness*, include as well a coming by act of parliament as a coming by any other way.

1 Jon. 187, Whitton v. Weston, Trin. 4 Car. 1.

And in a still later case it is said, that, although there may have been formerly a difference of opinion as to this point, it is now settled, that the

(X) Of a Discharge by Unity of Possession.

discharging clause of the 31 H. 8, c. 13, extends to lands vested in the crown by the 32 H. 8, c. 24.

Freem. 299, Star v. Elliot, Mich. 31 Car. 2; ‖and see Urrey v. Bowyer, Gwill. 250; Fosset v. Franklin, Gwill. 1579; Dennison v. Elsley, 1 M'Clel. & Y. 1; 2 Bligh, 94, N. S.; 3 Eag. & Y. 1398; Toller, 174, and cases there cited.

‖ It is to be observed, that the orders of Cistercians and Hospitallers were capable of other discharges, besides the qualified exemption of their lands, whilst they retained them in their own occupation; and that the grant, and the subsequent confirmation of that privilege by the council of Lateran, did not deprive them of the benefit of any absolute discharge for their lands to which they were then entitled, and particularly of the right of prescribing *in non decimando*(*a*) for themselves, their farmers and tenants, which they enjoyed in common with all other spiritual persons.(*b*) Thus in a case,(*c*) in which it appeared that the lands of which tithes were demanded were part of lands called Bromley Grange, which belonged, at the time of the dissolution, to the Abbey of Fountains, which was one of the greater monasteries of the Cistercian order, and that they had never paid tithes; the court presumed an absolute, not a qualified discharge *ratione ordinis*, although it was proved that other lands in Bromley Grange paid tithes while they were in the hands of tenants, and that the lands in question had always been in the occupation of the owners.

(*a*) To support such a prescription, it is necessary to show that the lands were in the hands of the religious house before the time of legal memory, and not merely that they were so at the time of the dissolution. Markham v. Smyth, 11 Price, 126, 3 Eag. & Y. 1071. Where there is evidence of the possession of the land at the dissolution, accompanied by proof of an immemorial usage of non-payment of tithes, it seems this will be good presumptive evidence that the land belonged to the monastery before the time of legal memory. Donnison v. Elsley, 1 M'Clel. & Y. 24; Carysfort v. Wells, Ibid. 606; Norton v. Hammond, 1 Younge & J. 103; Pritchall v. Honeyborne, Ibid. 149. The presumption may be strengthened by ancient documents, showing that the monastery held the lands at any remote period before the dissolution, although after the commencement of legal memory. Norton v. Hammond, *suprà*. (*b*) Fosset v. Franklin, M. 1673; T. Raym. 225; 3 Keb. 208, 217; 1 Eag. & Y. 501; Matthew v. Fitch, Serjeant Hill's MSS. vol. 25, p. 152; 3 Eag. & Y. 1238; Gwill. 778; Ingram v. Shackstow, Tr. 1748; Joddrell's MSS.; 3 Eag. & Y. 1242; Gwill. 819; Donnison v. Elsley, M. 1824; 1 M'Clel. & Younge, 24; 2 Bligh, 94, N. S.; 3 Eag. & Y. 1402; Norton v. Hammond, M. 1826; 1 Younge & Jervis, 103. (*c*) Ingram v. Thackstow, *suprà*.

In order to establish this ground of discharge, the land-owner must show satisfactorily that the lands were in the hands of the monastery before the council of Lateran, and also at the dissolution of the monastery. If he fails in either point, the exemption is not established.

Norton v. Hammond, 1 Younge & J. 94.‖

(X) Of a Discharge of the Payment of Tithes by Unity of Possession.

So long as land in a parish was in the possession of an abbot, who was also possessed of the rectory of the parish, the payment of tithes for the land was necessarily suspended; because the abbot could not pay tithes to himself.

2 Rep. 47, 48, The Archbishop of Canterbury's case.

But the land was not discharged of tithes by the unity of possession; because tithes do not issue out of land, but are collateral thereto.

11 Rep. 14, Priddle v. Napper; 2 Rep. 47, 49; Cro. Ja. 454; Com. 503.

And consequently, so soon as the possession of the land was severed

from that of the rectory, the land became again liable to the payment of tithes.

Com. 511, Fox v. Bardwell, 2 Rep. 47, 49; Cro. Ja. 454; 11 Rep. 14.

Nay it has been holden, that although there had been, previously to the dissolution of the religious house, a perpetual unity of possession of the land and the rectory in the abbot and his predecessors, this is not an absolute discharge of the tithes of the land; inasmuch as the words of the discharging clause in the 31 H. 8, c. 3, are not *discharged of tithes*, but *discharged of the payment of tithes.*

2 Rep. 47, The Archbishop of Canterbury's case; Hob. 298.

Great doubt was formerly entertained whether a perpetual unity of possession of land and the rectory of the same parish is *primâ facie* a discharge of the tithes of the land, within the meaning of the discharging clause in the 31 H. 8, c. 13.

11 Rep. 13, 14, Priddle v. Napper; 2 Rep. 48; Hob. 298, 311; Cro. Eliz. 578.

But it was at length determined, that if the land and the rectory had been in the possession of the abbot and his predecessors for time immemorial, and was so at the dissolution of the monastery, and it do not appear that tithes had ever been paid for the same, such land is *primâ facie* discharged of tithes by the 31 H. 8, c. 13. The reason given for this determination is, that, as it would be very difficult, if not impossible, to show at so great a distance of time in what manner the land was at first discharged of tithes, it shall be intended, that it was discharged by grant, in which case the discharge runs with the land.

2 Rep. 48, The Archbishop of Canterbury's case; 11 Rep. 13, 14; Hob. 298, 311; Cro. Eliz. 578; ‖Gwill. 859, 1354.‖

If it appear, however, that a farmer of the land had at any time before the dissolution of the monastery paid tithes for the same, this destroys the presumption arising from the perpetual unity of possession; and is evidence that, although the payment of tithes was suspended by reason of the unity of possession, the land was not discharged thereof by grant.

Hob. 298; Slade v. Drake, 2 Rep. 48; 11 Rep. 14; Hob. 311; Cro. Ja. 454; Comb. 511.

It has already been observed, that lands, heretofore discharged by order of the payment of tithes *quamdiu propriis manibus excoluntur.* which were vested in the crown by the 27 H. 8, c. 28, are not discharged of the payment of tithes by the 31 H. 8, c. 13.

Antè.

It is sufficient in this place to say, that land which was vested in the crown by the former of these statutes, is not by the latter absolutely discharged of the payment of tithes; notwithstanding there had been a perpetual unity of possession of the land and the rectory of the same parish in the abbot and his predecessors.

It has been determined in two cases, that land which was vested in the crown by the 32 H. 8, c. 24, is not discharged of tithes by the 31 H. 8, c. 13, although there had been, before the dissolution of the monastery to which the land belonged, a perpetual unity of possession of the land and the rectory of the same parish in the abbot and his predecessors; and it do not appear that any tithes have ever been paid for the same.

2 Rep. 46; Cro. Ja. 58.

(Y) Of Agreements and Leases concerning Tithes.

As the reasons upon which these determinations were founded have been already mentioned, it is not necessary to repeat them.

‖ See *antè*, p. 68, 69.‖

But, as has already been observed, the determinations in two subsequent cases have been, that the discharging clause of the 31 H. 8, c. 31, does extend to lands which were vested in the crown by the 32 H. 8, c. 24.

It has been holden, that, although there had been a perpetual unity of possession of land and the rectory of the same parish in a dean and chapter, and their predecessors, or in any other corporation which was not religious, as well as ecclesiastical, and it do not appear that any tithes have ever been paid for the land, it is not absolutely discharged of tithes by the 31 H. 8, c. 13; for that, whenever the houses dissolved, or to be dissolved, are mentioned in that statute, they are always called *religious and ecclesiastical houses*. The discharging clause in the twenty-first paragraph of that statute does indeed say, that the lands of the houses dissolved, and to be dissolved, shall be holden and enjoyed "discharged of the payment of tithes, as freely and in as ample a manner as the late abbots, priors, abbesses, and other ecclesiastical governors and governesses, or any of them, had, held, occupied, possessed, or enjoyed the same, or any parcel thereof;" but the construction has been, that as no houses, except such as were religious as well as ecclesiastical, had been dissolved, these words, *ecclesiastical governors*, only mean governors of houses which were religious as well as ecclesiastical.

2 Rep. 48, 49, The Archbishop of Canterbury's case; Cro. Eliz. 511.

‖ Where lands exempted from tithes, as being part of the demesne of an ancient monastery, were enclosed by act of parliament, it was held, that they were not rendered liable to tithes by a clause in the act, providing that the rector or impropriator of the parish, or his lessee, should receive all kinds of tithes from the new enclosures, notwithstanding any *modus*, or pretence of a *modus*, or composition in any other parts of the parish, or any exemption whatever; since such general words could not operate to destroy a clear legal exemption, when the whole scope of the clauses was merely to preserve such right as the impropriator had at the passing of the act.

Pratt v. Hopkins, 3 Bro. P. C. 521; see Gwill. 1387.‖

[A lease of tithes for so long time as the lessor shall continue vicar of A, is good, and conveys a freehold. But an agreement to accept a reasonable composition for tithes, not exceeding three shillings and sixpence per acre, is not a lease of the tithes, for the uncertainty of the render.

Brewer v. Hill, Anstr. 414.]

(Y) Of Agreements and Leases concerning Tithes.

It seems to be settled, that if a parol agreement be made for tithes, by way of sale thereof for a term of years, or for the life of the parson, in case he so long continue to be parson, the agreement is binding.

Bro. *contr.* pl. 13; Yelv. 94; 1 Brownl. 98; Palm. 377; Godb. 354; 8 Mod. 62.

But the law does not seem to be settled as to the validity of a parol agreement for tithes, by way of retainer thereof.

It is laid down in some books, that a parol agreement for tithes, by way of retainer thereof, for a term of years, is good.

Yelv. 95; Noy, 121; 2 Brownl. 11; 3 Leon. 247; Hetl. 128.

(Y) Of Agreements and Leases concerning Tithes.

In other books it is laid down, that if a parol agreement be made for the retaining of tithes during the life of the parson, in case he so long continue to be parson, the agreement is good.

Cro. Ja. 669, Honeycomb v. Sweet, 1 Lev. 24.

But it seems to be the better opinion, that such an agreement, either for years, or during the life of the parson, in case he so long continue to be parson, is not good.

It is in divers books laid down, that such an agreement is not good for more than one year; because it is in the nature of a lease of tithes, which is not good unless it be by deed.

Noy, 28; 1 Brownl. 98; Owen, 103; 1 Roll. R. 174; Godb. 354; Cro. Eliz. 249; Cro. Ja. 137, 360; Hard. 203.

And in one of these it is said expressly, that such an agreement is only good, even for one year, because it is *quasi* a sale of the tithes.

Cro. Ja. 137, Hawkes v. Brayfield.

And in a modern case, two out of three of the barons of the Exchequer were of opinion, that a parol agreement, by way of retainer of tithes, can only be good for one year.

Bunb. 2, Keddington v. Bridgman, Hil. 2 G. 1.

‖ It is perfectly settled, that parol compositions for the land-owner to retain his tithes, and in lieu thereof to pay a sum certain to the parson, are good as personal contracts without deed or writing; for they do not pass an interest in the tithes, which can only be done by deed.

Wyburn v. Tuck, 1 Bos. & Pul. 458; Gwill. 1517; Manby v. Taylor, 9 Price, 249; Brooksby v. Watts, 6 Taunt. 334; Gwill. 1743; Adams v. Waller, Gwill. 1204; 7 Bro. P. Ca. 65.

Such parol compositions, being mere personal contracts, cease on a change of occupation of the land, and cannot operate to discharge a new occupier from setting out the tithe. In such case, the amount of the former composition is *primâ facie* evidence of the value of the tithes.

Bennett v. Snell, Palm. 377; 1 Eag. & Y. 327; Peyton v. Kirkly, 3 Chitty, 405; Gwill. 1988; 3 Eag. & Y. 1391; *sed vide* Hulme v. Pardoe, M'Clel. 393; 3 Eag. & Y. 1164.

And such compositions are determined by the death or change of the incumbent; since the incumbent cannot, by any such agreement, bind his successor.

Brown v. Barlow, Gwill. 1001; 2 Eag. & Y. 19; Hawkins v. Kelly, 8 Ves. 308; Williams v. Powell, 10 East, 270; Aynsley v. Wordsworth, 2 Ves. & B. 331.

But if the successor accept the composition, this amounts to a revival of the agreement, and he cannot then determine it without the proper notice.

Machin v. Moulton, 2 Lutw. 1057; Lloyd v. Mortimer, 7 Bro. P. C. 493; Gwill. 1060.‖

If a parson, who has made a parol agreement, by way of retainer of tithes, for a term of years, or for the term of his life, in case he so long continue to be parson, afterwards bring an action upon the statute for subtraction of tithes, without having first given notice of his dissent to the agreement, the parishioner, although the agreement be not binding, shall not be liable to the penalties of the statute, nor to costs.

Hardr. 203, Bramer v. Thornton.

‖Nor is the parishioner, in such case, liable to a proceeding in the ecclesiastical court, or to a suit in equity for tithes.

Chapman v. Hurst, 1 Leon. 151; 1 Eag. & Y. 98; Adams v. Waller, 7 Bro. P. Ca. 65; Gwill. 1204; Hilton v. Heath, Gwill. 845; 2 Eag. & Y. 128; Bennett v. Snell, Palm. 377; 1 Eag. & Y. 327.‖

And notice of his dissent is not good, unless it be given before the land, of which he means to take tithes in kind, is manured and sown; because, perhaps, the land would not, if an earlier notice had been given, have been manured and sown.

Hardr. 203, Bramer v. Thornton.

‖It is now settled, that the notice for the determination of a composition for tithes is analogous to the notice from the landlord to a tenant from year to year of land; that is, it is necessary to give half a year's notice, expiring with the year of the agreement for composition. And, therefore, if a composition be made with A, as proprietor of the tithes, and he grants a lease of them to B for a term, whose interest is afterwards determined before any alteration is made in the composition, A cannot determine the composition without six months' notice to the occupier.

Hewitt v. Adams, Dom. Proc., 12 East, 84, n.; Wyburn v. Tuck, 1 Bos. & P. 458; Bishop v. Chichester, 3 Bro. C. R. 162.

The notice must be to determine the composition *in toto;* for it cannot be determined as to part, and continue as to the residue.

See 3 Taunt. 95; Gwill. 612.

And the notice must be so unequivocal that the party may know on what he is to depend: therefore, a mere demand by the vicar, in conversation, of his vicarial tithes, and a refusal to take the amount of the annual composition which was tendered by the occupier, without assigning any reason for the refusal, is not a sufficient notice to determine the composition.

Fell v. Wilson, 12 East, 83.

Where a house, lands, and tithes were held by parol at a joint rent, it was held, that a notice to quit the house, lands, and premises, with the appurtenance, sufficiently included the tithes.

Doe v. Church, 3 Camp. 71; 2 Eag. & Y. 649; and see 16 East, 53.

The question has been agitated in several cases, Whether such a notice is necessary where an occupier has set up a claim of *modus?* In Hume v. Wright, the Court of Exchequer decided that in such case a notice was not necessary; because, by insisting on a *modus*, the parishioner was setting up an adverse title. The decision of the Court of Exchequer, in Adams v. Waller, confirmed this doctrine: but the decree in this last case being reversed in Dom. Proc., (though without any discussion on this point,) Lord Thurlow, in the case of Bishop v. Chichester, considered the case of Hume v. Wright as overruled; and therefore, contrary to his own opinion against the necessity of a notice in such case, considered himself bound by the authority of the Dom. Proc., in Adams v. Waller, to decide that a parishioner was entitled to such a notice, notwithstanding that he denied the parson's right to tithes by setting up a *modus*. The question was again discussed in Atkins v. Willoughby; but the case was decided on another point. In the case of Fell v. Wilson, Chambre, J., at the trial was of opinion that no such notice was necessary where the defendant set up a *modus*, since the case was analogous to that of a tenant from year to

year disclaiming to hold of his landlord; and the court afterwards, on a motion for a nonsuit, appear clearly to have been of the same opinion: but as there was no distinct evidence of a *modus* being set up *till the trial*, the court decided that the defendant was entitled to object to the want of notice. In a late case in the Common Pleas, (Bower v. Major,) in which it appeared that the parishioner had for two years refused to set out tithe of hay, on the ground of a *modus*, the court held the case analogous to that of a tenant disclaiming his landlord's title, and that no notice was therefore necessary.

3 Wood, 320; Gwill. 1217; Gwill. 1204; 2 Bro. C. C. 161; Anstr. 397; 12 East, 83; 1 Bro. & B. 4; ‖3 Moo. 217; 3 Eag. & Y. 956; and see Wolley v. Brownhill, M'Clel. 317; but see Wolley v. Hadfield, 3 Price, 210; Gwill. 1790; and see 2 Eag. on Tithes, 31, 32.‖

(As to the apportionment of money received on compositions, as between the executors of a deceased incumbent and his successor, see tit. "RENT," Vol. viii., and 10 East, R. 269; 8 Ves. R. 308; 2 Ves. & B. 331.)‖

If a parol agreement by way of retainer of tithes, be made by a parson, and he refuse to abide thereby, the parishioner, although the agreement be not binding as to the tithes, may maintain an action against the parson for non-performance of the agreement.

2 Leon. 73, Wellock's case; Cro. Eliz. 249; Godb. 273; ‖1 Eag. & Y. 89.‖

But if a parol agreement for years be made with A, that he and his assigns shall retain the tithes of certain land, and the land be afterwards assigned over to B, B cannot maintain an action for non-performance of the agreement, inasmuch as the benefit of a parol agreement cannot be assigned.

Cro. Eliz. 240, Nelson v. Woodward.

On the other hand, if a parishioner refuse to pay the money due upon a parol agreement, by way of retainer of tithes, the parson, although the agreement be not binding as to the tithes, may maintain an action for the money agreed for.

2 Show. 307, Eaton v. Sherwin; ‖Brooksby v. Watts, 6 Taunt. 334; Hulme v. Pardoe, M'Clel. 393; 3 Eag. & Y. 1164.‖

It is laid down in some cases, that a lease of tithes by parol is not good; because tithes, which lie in grant, cannot pass without deed.

Latch, 176; Bellamy v. Balthorp, 2 Brownl. 11.

In other cases it is laid down, that a lease by parol of tithes is good for one year, because the lease enures *quasi* a sale of the tithes.(*a*)

Cro. Eliz. 249; Godb. 354, 374; Freem. 234. ‖(*a*)But a parol lease of tithes, not yet severed from the nine parts, cannot operate as a sale; for the parson has no possessory interest capable of being sold until the tithes are severed. See Rex v. Ellis, 3 Price, 323; 3 Eag. & Y. 776; Chase v. Calmel, 3 Burr. 1873; Wyburd v. Tuck, 1 Bos. & Pul. 458; Gwill. 1517.‖

But the doctrine of the former cases is adhered to in two modern cases.

In one of these it was holden, that a lease by parol of tithes, even for one year, is not good.

Bunb. 2, Keddington v. Bridgman, Hil. 2 G. 1.

In the other it is laid down, that tithes which lie in grant cannot pass without deed.

8 Mod. 63, The King v. Fairclough, Mich. 8 G. 1. ‖See Paynton v. Kirkby, 3 Chitt. 405; 3 Eag. & Y. 1391; Adams v. Waller, Gwill. 1220; Jackson v. Benson, 1 M'Clel.

(Z) Of Suits for Tithes in the Spiritual Court.

62; Gwill. 2074; from which, and various other cases, it is clear, that no *interest* in tithes can be granted without deed, unless, indeed, where they pass as parcel of a rectory, which being considered a corporeal hereditament, may be demised for three years without deed. Bro. Ab. tit. *Lease*, 1, 15, 20; 2 R. A. 63; Bellamy v. Balthorpe, Godbolt, 373; Latch, 176; 1 Eag. & Y. 355; Brewer v. Hill, 2 Anstr. 413; Gwill. 1418; 2 Eag. & Y. 412.‖

A lease of tithes, to commence at a future day, is void; for, although the tithes are not parcel of, but collateral to, the land, the same rules are to be observed in leases of tithes as in leases of land.

Yelv. 131, Edmonds v. Booth.

(Z) Of a Suit in a Spiritual Court for Subtraction of Tithe.

At the common law there was no other remedy against a person who had neglected to set out or pay his tithe, than by suit in a spiritual court.

Bro. *Dism.* pl. 1, pl. 5, pl. 6, pl. 10; 2 Rep. 44; Vaugh. 195.

If tithe, which had been severed by a proper person from the nine parts, were afterwards carried away by a stranger, the parishioner was not answerable for it; but the remedy against the person carrying it away was by an action in a temporal court; for, by the severance, *it was vested in the parson, and become lay chattel.*

Bro. *Dism.;* Noy, 4; 2 Bulstr. 184; Cro. Eliz. 607.

But if the severance of the tithe were by a stranger, who had no colour of title to the land upon which it arose, this did not take away the right of the parson to sue the parishioner in a spiritual court for subtraction of tithe; because there was not such a property in the tithe vested in the parson by this severance, as would have enabled him to maintain an action at law against the person who should afterwards carry it away.

3 Bulstr. 337, Mountford v. Sidley; Latch, 8.

By the 32 H. 8, c. 7, § 2, it is enacted, "That in case any person shall detain and withhold any tithe, the party having cause to demand or have the same may sue for the same in a spiritual court."

The construction of this clause has been, that if the person who has legally set out tithe afterwards carry it away, the party to whom the tithe was due may sue for it in a spiritual as well as in a temporal court; for that the words *detain and withhold* fairly extend to a carrying away of tithe after it has been set out.

Cro. Eliz. 607, Leigh v. Wood.

But it was in the same case holden, that this clause does not give jurisdiction to any spiritual court, where tithe, which has been legally set out by a proper person, is afterwards carried away by a stranger.

Cro. Eliz. 607, Leigh v. Wood.

If any doubt did remain, as to the carrying away of tithes by the person who had legally set it out, this is, as to predial tithes, entirely removed by the 2 & 3 Ed. 6, c. 13, § 2, it being thereby enacted, "That if any person do willingly withdraw his tithe of corn or hay, or of such other things whereof predial tithes ought to be paid, by reason whereof the said tithe is lost, impaired, or hurt; that then, upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint, the party so withdrawing shall pay the double value of the tithe so withdrawn, over and above the costs, charges, and expenses

of the suit; the same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws."

The construction of this clause has been, that if a stranger carry away the tithe, after it has been legally severed from the nine parts, an action upon the statute does not lie against the stranger.

Noy, 44, Webb v. Potts.

Only spiritual persons could, at the common law, sue in a spiritual court for subtraction of tithe.

Bro. *Dism.* pl. 9; 2 Inst. 648; 2 Rep. 44; Cro. Eliz. 512.

But as laymen, soon after the dissolution of monasteries, became possessed of estates in tithes, it was necessary that they should be enabled to sue for subtraction thereof.

For the sake of enabling them to do this, it is by the 32 H. 8, c. 7, § 2, enacted, "That in case any person shall detain and withhold any tithe, the party being ecclesiastical or lay person, having cause to demand or have the said tithe, shall and may convene the person so offending before the ordinary, his commissary, or other competent minister or lawful judge, of the place where such wrong shall be done, according to the ecclesiastical laws; and in every such cause or matter of suit the same ordinary, commissary, or other competent minister or lawful judge, shall and may, by virtue of this act, proceed to the examination, hearing, and determination of every such cause or matter, according to the course and process of the ecclesiastical laws; and thereupon may give sentence accordingly."

It was heretofore usual to cite persons from all parts of England to answer for subtraction of tithe in the prerogative courts of Canterbury and York.

12 Mod. 252, Machin v. Malton.

In order to put a stop to this great vexation, it is, by the 23 H. 8, c. 9, § 2, enacted, "That no person shall be from henceforth cited, summoned, or otherwise called, to appear before any ordinary, or other spiritual judge, out of the diocese or peculiar jurisdiction wherein the person, who shall be cited, summoned, or otherwise called, shall be inhabiting, at the time of the awarding or going forth of the same citation or summons," except in certain cases mentioned in this statute, of which subtraction of tithes is not one.

It is moreover enacted, by the 32 H. 8, c. 7, § 2, "That every suit for subtraction of tithe shall be brought in the court of the ordinary, commissary, or other competent minister or lawful judge, of the place where the wrong shall be done."

It has been holden, that the direction of the latter statute is to be followed, as to the spiritual court in which a suit for subtraction of tithe is to be instituted.

A person who lived in the diocese of A had subtracted tithe in the diocese of B. Being cited to answer for this in the court of the bishop of B, a prohibition was moved for; and it was insisted, that by virtue of the 23 H. 8, c. 9, every citation for subtraction of tithe must be to a court belonging to the jurisdiction in which the person cited lives. The court being doubtful, a prohibition was, for the sake of having the point settled, granted; but afterwards the whole court were, upon deliberation, of opinion that a consultation ought to be awarded.

2 Mod. 352, Machin v. Malton.

(Z) Of Suits for Tithes in the Spiritual Court.

At the common law only the tithe, or the value thereof, with costs of the suit, could be recovered in a suit for subtraction of tithe.

2 Inst. 651.

But a better remedy is given by the 2 & 3 Ed. 6, c. 13, § 2, in the case of predial tithes, (one clause of which is above set out:) it being thereby enacted, "That if any person do carry away his corn, hay, or other things of which predial tithes are due, before the tithe thereof be set forth; or do willingly withdraw any of his said predial tithes; or do stop (*a*) or let the parson, vicar, proprietor, owner, or other their deputies or farmers, to view and see all manner of their predial tithes to be justly and truly set forth, and severed from the nine parts, and the same quietly to take and carry away, by reason whereof the said tithe is lost, impaired, or hurt; that then the party so carrying away, withdrawing, stopping, or letting, shall pay the double value of the tithe so taken, lost, withdrawn, or carried away, over and above the costs, charges and expenses of the suit; the same to be recovered according to the king's ecclesiastical laws."

‖(*a*) As to what road may be used by a parson for fetching away his tithes, see Cobb v. Selby, 2 New R. 466.‖

It is laid down, that the double value, which may be recovered under this statute in a spiritual court, is to be over and above the value of the tithe; and, consequently, that a suit in a spiritual court for subtraction of predial tithe is more advantageous than an action upon the statute in a temporal court for the treble value; inasmuch as the treble value of the tithes may be recovered in the spiritual court, together with the costs of the suit.(*b*)

2 Inst. 651. ‖(*b*) By the 8 & 9 Will. & M. c. 11. the plaintiff is entitled to costs in a temporal court, where the value of the tithes does not exceed the sum of twenty nobles, (6*l.* 13*s.* 4*d.*)‖

But it seems to be the better opinion, that only the double value of the tithe and the costs of the suit can be recovered, in a suit in a spiritual court for subtraction of a predial tithe.

In a suit in a spiritual court for subtraction of tithe, the sentence was, that the plaintiff, besides the double value of the tithe and the costs of the suit, should also recover the single value thereof. A prohibition was awarded. And by the court—The spiritual court is not empowered by the 2 & 3 Ed. 6, c. 13, to give more than the double value of the tithe and the costs of the suit, in a suit for subtraction of tithe.

Godb. 245, Baldwin v. Geery.

If the defendant die, pending a suit upon the 2 Ed. 6, c. 13, in a spiritual court for subtraction of tithe, and afterwards another suit be commenced against his executor, a prohibition lies; for the double value, given by that statute, is given by way of punishment for the personal wrong in subtracting the tithe; and an executor is not answerable for a personal wrong done by his testator.

Sid. 181, Weekes v. Trussel.

It is in general true, that there is no method of enforcing obedience to a sentence of a spiritual court by fine, imprisonment, or amercement.

4 Inst. 324; 11 Rep. 44.

But by the 32 H. 8, c. 7, § 4, it is enacted, "That if any person, after a definitive sentence given against him in an ecclesiastical court for subtraction of tithe, obstinately and wilfully refuse to pay his tithe, or such

(Aa) Of prohibitions to Suits in the Spiritual Court.

sums of money wherein he shall be condemned for the same, that then two justices of the peace shall have authority by this act, upon information, certificate or complaint to them made in writing, by the ecclesiastical court that gave the same sentence, to cause the party so refusing to be committed to the next jail, and there to remain without bail or mainprise, until he shall have found sufficient sureties, to be bound in recognisance or otherwise before the same justices, to the use of our sovereign lord the king, to perform the said sentence."

‖ In a modern case in the Consistory Court of London, the question was discussed, Whether a bankrupt's certificate was a bar to a demand for subtraction of tithes in the ecclesiastical court, the tithes having become due before the act of bankruptcy, and the certificate having been obtained a few days before the affirmative issue had been given to the libel? Sir William Scott, not being satisfied that the demand was not barred, declined to decree excommunication against the defendant.

Braithwaite v. Hollingshead, 1 Haggard, R. 470.‖

(Aa) In what Cases a Prohibition lies to a Suit in a Spiritual Court for Subtraction of Tithe.

NOTWITHSTANDING the general jurisdiction which spiritual courts have in the matter of tithes, a prohibition in many cases lies to a suit in a spiritual court for subtraction of tithe.

But it is sometimes difficult to determine, whether a prohibition does or does not lie to such suit.

It is a rule of law, that questions concerning temporal matters are only to be tried in temporal courts.

Fitz. N. B. 40; 2 Inst. 613; Cro. Eliz. 228; 2 Roll. Abr. 291.

But there is another rule of law, that *ubi cognitio principalis est, ibi debet esse cognitio accessorii.*

A desire of reconciling these two rules of law, together with the difficulty of doing it, has been productive of determinations which are not easily to be reconciled.

As some of these determinations are founded upon nice distinctions, the law, concerning the awarding of a prohibition to a suit in a spiritual court for substraction of tithe, will be much better collected from submitting the principal cases to the reader's judgment, than from any general rules which can be laid down.

If payment be pleaded to a libel in a spiritual court for subtraction of tithe, a prohibition does not lie; because the question, whether there was such payment, is such an incidental one as may be well tried in the spiritual court.

Cro. Eliz. 666, Mallory v. Mariot.

If to a libel in a spiritual court for subtraction of tithe of wood there be a plea of gross wood, a prohibition does not lie; for the question, whether the wood of which the tithe is demanded be gross wood, may be well tried in the spiritual court.

Ld. Raym. 835, Dike v. Brown.

If the validity of letters patent, or of a feoffment or release, come in question in a suit in a spiritual court for subtraction of tithe, a prohibition

does not lie; because the validity of either of these may be well tried in the spiritual court.

Ld. Raym. 74, Chamberlain v. Hewitson.

If a suit be in a spiritual court for subtraction of tithe due by custom, a prohibition does not lie; for tithe due by custom may as well be sued for in a spiritual court as tithe which is due of common right.

Hob. 247; Latch, 125; 3 Lev. 103; Bunb. 8.

A suit may be in a spiritual court for that which is to be paid as a *modus:* for as the tithe, in lieu of which it is to be paid, is so absolutely discharged, that the parson cannot resort to the taking thereof in kind, the *modus* becomes a spiritual fee, and, consequently, it is recoverable in a spiritual court.

Hob. 42, 247; 1 Ventr. 274; Bunb. 8.

Nay, it is said in one case, that a suit for that which is to be paid as a *modus* can only be instituted in a spiritual court.

12 Mod. 416, Johnson v. Ryson.

It was heretofore holden, that a prohibition would lie to a suit in a spiritual court for subtraction of tithe, upon the bare suggestion of a customary method of tithing, or of a *modus;* although the customary method of tithing, or the *modus*, had not been pleaded in the spiritual court.

2 Rep. 45, The Archbishop of Canterbury's case; Cro. Eliz. 511.

It has been since holden, that a prohibition does not lie in such case, unless the cause suggested for obtaining the prohibition has been pleaded in the spiritual court; for that, as the court has a general jurisdiction in the matter of tithes, the *modus*, by which it is to be deprived of that jurisdiction, must be pleaded specially.

Lord Raym. 835; Dike v. Brown, Salk. 655.

But if a bill be filed in a court of equity to establish a *modus*, and it appear that a suit is instituted in a spiritual court for subtraction of the tithe, for which the *modus* is alleged to be a recompense, an injunction is usually granted; although the *modus* have not been pleaded.

Bunb. 176, Blackett v. Finny. ‖But see Rotheram v. Fanshaw, 3 Atk. 628; 1 Eden, R. 276.‖

If a customary method of setting out tithe, or a *modus*, be pleaded to a suit in a spiritual court for subtraction of tithe, a prohibition does not lie, unless the spiritual court have refused to admit the plea, or the truth thereof be denied.

Bunb. 17, Offley v. Whitehall; Hob. 247; 1 Ventr. 165, 274; 1 Sid. 283; Bunb. 8.

‖However, in a subsequent case, a prohibition was granted on a mere affidavit, that the defendant in the spiritual court had answered on oath or pleaded a *modus*, though it did not appear that the *modus* was regularly put in issue.

French v. Trask, 10 East, 348; and see *per* Bayley, J., 5 Barn. & C. 22, and tit *Prohibition*, Vol. viii. p. 225.‖

But if the customary method of setting out tithe, or the *modus*, which is pleaded to a suit in a spiritual court for subtraction of tithe, appear plainly to be bad, a prohibition does not lie, although the truth of the plea be denied; for it would be quite nugatory to award a prohibition in order to try the existence of a thing, which, if it do exist, is bad.

12 Mod. 206; Hill v. Vaux, Salk. 656.

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It is in general true, that if the existence of a customary method of setting out tithe, or the validity of a *modus*, come in question in a suit in a spiritual court for subtraction of tithe, a prohibition lies; because the existence of the custom or the validity of the *modus* cannot be well tried in such court. The reason is, that in some cases a usage of ten years, in others a usage of twenty years, in others a usage of thirty years, and in all a usage of forty years, does, by the ecclesiastical law, make a custom; whereas there cannot be a customary method of setting out tithe, or a valid *modus*, unless the tithe has time immemorially been set out in the method prescribed for, or the *modus* has been paid time immemorially.

2 Inst. 643; Hob. 247; Latch, 48; Cro. Ja. 454; 1 Ventr. 274; 2 Lev. 103; Lord Raym. 436; Bunb. 8, 17.

If, after a prohibition have been awarded, issue be taken upon the existence of a customary method of setting out tithe, or the validity of a *modus*, which has been pleaded in the spiritual court, and the verdict in prohibition be, that there is not such a customary method of setting out tithe, or such a *modus*, a consultation ought to be awarded, inasmuch as the reason of tying up the hands of the spiritual court does no longer exist.

Hob. 192, 247; Godb. 245; Cro. Car. 113; 2 Lev. 103; Hardr. 510.

But if the verdict in prohibition find the customary method of setting out tithe, which has been pleaded in the spiritual court, to be good in part, a consultation ought not to be awarded; because, as the custom is in part good, the suit ought not to proceed in the spiritual court.

Hob. 192, Berrie's case.

If one *modus* be suggested as a cause of prohibition, and a verdict in prohibition find a different *modus*, a consultation ought not to be awarded; because the validity of the *modus* which is found, cannot be well tried in a spiritual court.

Cro. Eliz. 736; Austin v. Pigot, Hetl. 100.

If the bounds of a parish come in question in a suit in a spiritual court for subtraction of tithe, a prohibition lies.

2 Roll. Abr. 282, E, pl. 3; 1 Ventr. 335; 1 Lev. 78; ‖ Stainbank v. Bradshaw, 10 East, 349; 2 Eag. & Y. 568.‖

But it is said, that although a spiritual court cannot try the bounds of a parish, the bounds of a vill in a parish may be tried in such court.

1 Sid. 89; 1 Lev. 89.

And in one case it is laid down, that a spiritual court can try the bounds of a vill in a parish.

2 Roll. Abr. 312, pl. 7, Ives v. Wright. ‖See Reeves v. Bould, 1 Keb. 945; 1 Eag. & Y. 447; Butler v. Yateman, 1 Keb. 354; 1 Eag. & Y. 437. *Quære*, Whether there is any sound distinction between the case of a vill and of a parish?‖

But if the reason of the determination in this case, which is, that the dispute was between two spiritual persons, be attended to, it by no means follows, that the bounds of a vill in a parish can in general be tried in a spiritual court.

If the right of carrying away tithe by a particular way come in question in a suit in a spiritual court for subtraction of tithe, a prohibition lies; because a right of way generally depends upon usage.

1 Bulstr. 68, Anon.

Wherever a spiritual court tries a temporal matter, which is incidental

(Bb) Of Suits in Equity for Tithes.

to a question concerning subtraction of tithe, the temporal matter must be tried according to the rules of the common law; otherwise a prohibition lies.

Hob. 188; 1 Ventr. 291; 2 Lev. 64; Salk. 547; Ld. Raym. 74.

If a party, who has pleaded payment to a suit in a spiritual court for subtraction of tithe, offer to prove this by one witness, and the proof be not admitted, a prohibition lies; for, although two witnesses are necessary by the ecclesiastical law in every case, the common law requires but one in this case.

Cro. Eliz. 666, Mallory v. Mariot. ‖ See tit. *Prohibition*, (L), 5, and cases there cited.‖

But, if a spiritual court in such case admit proof by one witness to be sufficient, that court is to judge by its own rules of the competency of the person adduced as a witness.

Salk. 547, Shotter v. Friend.

It is laid down generally in some books, that a prohibition lies to a suit in a spiritual court for subtraction of tithe after sentence.

Salk. 547; Ld. Raym. 835.

In other books it is laid down, that although a prohibition does lie after sentence, in a case wherein the spiritual court had not jurisdiction in the principal matter, none lies to a suit for the subtraction of tithe after sentence; because, as the spiritual court had jurisdiction in the principal matter, the defect can only have been of jurisdiction to try some incidental matter, in which case a prohibition does not lie after sentence.

Salk. 548; Bunb. 17.

‖ It is now settled, that the application for a prohibition to the spiritual court, on the ground of a *modus* being pleaded, must be made *before* sentence; since such a prohibition is granted solely *pro defectu triationis*, and not *pro defectu jurisdictionis;* in which latter case only can a prohibition be had after sentence.

Full v. Hutchins, Cowp. 422; Darby v. Cousins, 1 Term R. 552; Stainbank v. Bradshaw, 10 East, 349.‖

But, if the sentence of a spiritual court be illegal, a special prohibition may be obtained to a suit in a spiritual court for subtraction of tithe after sentence.

In a suit upon the 2 E. 6, c. 13, for subtraction of a predial tithe, the sentence of the spiritual court was, that the plaintiff, besides the double value of the tithe and the costs of the suit, should likewise recover the single value of the tithe by way of damages. As a spiritual court is not empowered by that statute to give more than the double value of the tithe and the costs of the suit, the sentence was holden to be illegal; and a special prohibition was awarded.

Godb. 245, Baldwin v. Geery. ‖ See Sandford v. Porter, 2 Chitt. R. 351; 3 Eag & Y. 1392.‖

‖ See, on the subject of prohibitions, Vol. viii. tit. "Prohibition."‖

(Bb) Of a Suit in a Court of Equity for Subtraction of Tithe.

The courts of Chancery and Exchequer have both jurisdiction in the case of subtraction of tithe.

(Bb) Of Suits in Equity for Tithes.

A bill in equity may be filed for subtraction of tithe, however small the value of the tithe subtracted is.

Bunb. 28, Anon. ‖See 4 Bro. P. C. 314; 2 Eag. & Y. 52; Gwill. 736; 1 Wood, 441; 1 Eag. & Y. 660; Gwill. 549.‖

If a bill in equity be filed for subtraction of tithe belonging to a portion of tithes, or of the tithes of a particular thing, every person entitled to any tithe arising in the parish in which the tithe is claimed by the bill, must be a party thereto; because the right of every such person may be affected by the decree.

Bunb. 115, Bailey v. Worrall; Bunb. 263.

A sequestrator cannot file a bill in equity for subtraction of tithe during the vacancy of the benefice, without making the bishop of the diocese a party; because the sequestrator is accountable to the bishop for what he receives.

Bunb. 192, Jones v. Barrett.

If a bill in equity be filed by a sequestrator, during the insanity of an incumbent, for subtraction of tithe, the incumbent or his committee must be a party to the bill; otherwise, if the incumbent should recover his senses, and file another bill for the same tithe, a recovery by the sequestrator could not be pleaded in bar to the second bill.

Bunb. 141, The Bishop of London v. Nicholls.

If a rector or impropriator file a bill in equity, for subtraction of tithe belonging to a rectory, it is sufficient to show a title to the rectory; the right of tithe being incident to the right of rectory.

Bunb. 225, Charlton v. Charlton.

But an impropriator must in such a bill show that either himself, or the person under whom he claims, has an estate in fee in the rectory

Bunb. 115, Penny v. Hooper

It is not, however, necessary for an impropriator to derive his title in such bill from the original grant of the rectory by the crown; it being sufficient to show that he is seised thereof in fee.

Bunb. 296, Leigh v. Maudesley.

‖ And it has been determined by the House of Lords, that a lay impropriator in possession of a rectory, and in perception of the tithes, has a sufficient title to sustain a suit against occupiers for an account of tithes, although the rectory is subject to mortgages, and the legal estate is in trustees.

Glegg v. Legh, 1 Bligh, P. C. 302, new series; and see 4 Madd. 193, S. C.‖

If a vicar file a bill in equity for subtraction of tithe, he must show himself entitled by endowment or augmentation to the title claimed; because a vicar can have no right to tithe, except by endowment or augmentation.

Cro. Eliz. 633; 2 Bulstr. 27; Bunb. 7, 72, 169. ‖See *antè*.‖

It is not, however, necessary for a vicar to set out in such bill the deed by which his vicarage was endowed or augmented with the tithe claimed; for if he can show, that he and his predecessors have constantly received the tithe, it shall be intended that the vicarage has been endowed or augmented therewith.

2 Bulstr. 27; 2 Keb. 729; Hardr. 329; Bunb. 7, 169.

(Bb) Of Suits in Equity for Tithes.

If a bill be filed for subtraction of tithe belonging to a portion of tithes, the plaintiff must not only show a title to the tithe claimed, but he must likewise show a receipt of the tithe by himself and those under whom he claims.

Bunb. 325, Charlton v. Charlton; Bunb. 262. ‖See Crayhorne v. Taylor, 2 Bro. P. Ca. 517; Gwill. 650; Lowther v. Bolton, Gwill. 1120; 3 Eag. & Y. 1271.‖

If the defendant, in his answer to a bill in equity for subtraction of tithe, admit the plaintiff's title to the tithe claimed, and only insist upon being discharged of the tithe, or of the payment thereof, the want of having set out a title in the bill is thereby cured.

Bunb. 72, Pye v. Rea; Hardr. 130.

If a bill in equity be filed for subtraction of a predial tithe, without waiving the penalty of the treble value given by the statute, a demurrer lies; for a court of equity will never compel a defendant to discover any thing, by the discovery of which he may become liable to a penalty.

1 Vern. 60, Anon.; Hardr. 137, 190.

But, if the plaintiff in such bill only pray relief as to the single value of the tithe subtracted, it is not necessary to waive the penalty.

Bunb. 193, The Attorney-General v. Vincent; ‖Wools v. Walley, 1 Anstr. 100; Gwill. 1383.‖

‖And if an executor file a bill for tithes, although he do not offer to accept the single value, it is sufficient; for an executor not being entitled to the penalty, he is not obliged to waive it.

Anon., Gwill. 532.‖

A bill in equity having been filed for subtraction of tithe, the defendant stood out till a sequestration was granted, and the bill was of course taken *pro confesso*. The defendant afterwards moved for a rule, that upon paying costs the value of the tithe might be ascertained by the taxation of the master, or by the oath of the plaintiff. This was refused: but a rule was made for the plaintiff to show cause why he should not consent to make oath of what value the tithe was.

Bunb. 26, Baily v. Peasly.

If a tender were made before the bill in equity for subtraction of tithe was filed, and a tender be again made by the answer, the defendant is not liable to costs.

Bunb. 28, Anon.

But, if the defendant did not make a tender before the bill was filed, he must, notwithstanding he make a tender by his answer, account for the tithe, and pay costs, how small soever the value of the tithe subtracted is.

Bunb. 28, Anon.

If a bill be filed in the Court of Exchequer for subtraction of tithe, and the defendant plead, that a *modus* for the tithe thereby claimed has, after directing an issue, been established by a decree of the Court of Chancery, the plea is good in bar to the bill in the Court of Exchequer.

Bunb. 211, Geale v. Wintour.

A plea of non-residence is good in bar to a bill in equity, brought by a rector or vicar for subtraction of tithe.

Bunb. 211, Geale v. Wintour; ‖Quilter v. Mussendine, Gilb. Exch. R. 228.‖

But it must be shown that the non-residence was before the time in which the tithe claimed by the bill became due.

Bunb. 211, Geale v. Wintour.

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The statute of limitations cannot be pleaded in bar to a bill in equity for subtraction of tithe; because the defendant is considered as a bailiff or receiver of the plaintiff, and that statute does not extend to demands upon such persons.

Bunb. 213, Marston v. Cleypole. ‖ See Meade v. Norbury, 2 Price, 338; 3 Eag. & Y. 746; Carysfort v. Wells, M'Clel. & Yo. 636.‖

‖But by the 53 Geo. 3, c. 127, § 5, it is enacted, that no action shall be brought for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due.‖

If a bill in equity be filed for subtraction of tithe due of common right, the defendant cannot avail himself of a discharge of the tithe, or of the payment thereof, unless the discharge be specially pleaded.

Bunb. 61, Jordan v. Colley.

A discharge of the tithe of one thing, or of the payment thereof, may be insisted upon, in an answer to a bill in equity for subtraction of tithes of divers things.

Bunb. 297, Leigh v. Maudsley.

But if the defendant, in his answer, insist upon a discharge of all tithes, or of the payment thereof, and prove only a discharge of some tithes, or of the payment thereof, he cannot derive any benefit from the discharge proved.

Bunb. 297, Leigh v. Maudsley.

Divers moduses for the tithes of divers things may be insisted upon in an answer to a bill in equity for subtraction of tithes: but they must be pleaded severally; for one *modus* cannot be pleaded distributively for the tithes of divers things.

Bunb. 80, Tarton v. Clayton.

If a *modus* be insisted upon, in an answer to a bill in equity for subtraction of tithe, the day upon which it is to be paid ought to be set out.

And in three modern cases the moduses were disallowed; because the days of paying them were not set out in the respective answers.

Bunb. 105, Goddard v. Keeble, Pasch. 8 G. 1; Pemberton v. Sparrow, Trin. 8 G. 1; Eloy v. Prior, Hil. 10 G. 1.

But in another modern case, wherein a *modus*, the day of paying which was not set out, had upon an issue directed been found for the defendant, it was holden, that the defect of having set this out was cured by the verdict; and the *modus* was established.

Bunb. 280, Woolferston v. Manwaring, Hil. 3 G. 2.

In a still later case, the following distinction was taken by Reynolds, C. B., namely, that the want of having set out the day upon which a *modus* is to be paid, in an answer to a bill in equity for subtraction of tithes, may be so supplied by evidence as to be a foundation for the court to direct an issue to try whether there be the *modus*, with liberty to endorse the day of payment upon the *postea;* but that if a bill in equity be brought to establish a *modus*, the day of paying it must be expressly set out.(*a*)

Bunb. 328, Gibb v. Goodman, Trin. 7 G. 2. ‖(*a*) It seems clear that greater certainty is required in the statement of a *modus* in a bill than in an answer; but it seems that in either case it is sufficient to state the *modus* to be payable *on or about* a particular day. Richards v. Evans, 1 Ves. 30; Gwill. 802; Baker v. Athill, 2 Anst. 491;

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Gwill. 1422; Atkins v. Hatton, 4 Wood. 410; Atkins v. Lord Willoughby, 4 Wood, 419; Cart v. Hodgkin, 3 Swanst. 160; Gwill. 814. But some time of payment ought to be specified. Roberts v. Williams, 12 East, 33; and see Scott v. Carter, 1 Younge & J. 452. The court will establish a *modus*, though proved to be payable on a day different from that alleged in the bill. Anderdon v. Davies, Gwill. 1268; *sed* vide *contrà*, Goodwin v. Wortley, 2 Wood, 331; Gwill. 715.‖

It was holden in one case, that it is incumbent upon the plaintiff to prove the quantity and value of the tithe claimed by a bill in equity for subtraction of tithe.

Hardr. 4, The Attorney-General v. Straite.

But the authority of this case has been often denied; and it is now constantly holden, that the defendant must in all cases,(*a*) even where a *modus* is pleaded, set out, in his answer to a bill in equity for subtraction of tithe, the quantity and value of the tithe claimed by the bill; because it frequently happens that no person except himself knows these things.

Bunb. 60, Gumley v. Fontleroy. ‖(*a*) Not, however, in cases where the plea absolutely denies the plaintiff's title, (which a *modus* does not;) as where the defendant pleads non-residence of the incumbent as a bar under the 13 Eliz. c. 20; Mills v. Etheridge, Bunb. 210; Eag. & Y. 806; Quilter v. Mussendin, Gilb. Eq. R. 228; Gwill. 667.‖

It was not heretofore the practice of the Court of Exchequer to decree, that the defendant should account for tithe which became due after the filing of the bill for subtraction of tithe.

2 P. Wms. 463, Carleton v. Brightwell.

But the practice, at that time, of the Court of Chancery, was to decree that an account should be taken of all tithes due at the time of making the decree.

2 P. Wms. 463, Carleton v. Brightwell. [So, Abp. of York v. Stapelton, 2 Atk. 136; Bell v. Read, 3 Atk. 592.]

And it was said in a case in the Court of King's Bench, by Lord Mansfield, C. J., that the practice of the Court of Exchequer is at this day the same as that of the Court of Chancery.

MS. Rep. Robinson v. Bland, Mich. 1 G. 3. ‖In the Exchequer, the decree is, to account for tithes due to the filing of the bill; in the Court of Chancery, to the time of the Master's report. 2 Atk. 136; Gwill. 773; 3 Atk. 590; Gwill. 804; 2 P. Will. 462; Gwill. 676.‖

The right of a court of equity to decree an account and payment of tithes, at the suit of a person claiming such tithes, must be grounded on a clear, unquestionable, legal right of tithes in the plaintiff, or in some person in trust for him; *the right to the account being merely consequential in the legal right to the tithes.* The courts of equity, therefore, have constantly made a distinction between those cases in which the title of the plaintiff to the tithes claimed is not generally disputed, but it is objected only that the lands from which they are claimed are exempt or discharged from payment of tithes; or, that the tithes claimed are not payable in kind, but are to be satisfied in some other manner, as by a payment of a *modus* or composition real: and these cases, in which the title to the tithe claimed is denied to the plaintiff, and a title is set up in another person. In the first description of cases, the defendant claiming the benefit of an exemption or discharge, or of a *modus*, or real composition, acknowledges the original title of the plaintiff, as alleged by him, but qualifies that title, either by an absolute discharge from payment of the tithes demanded, or by a right to satisfy that demand, otherwise than by payment of the tithes in kind. In

the second description of cases, the existence of that title to the tithes in question is absolutely and totally denied, and it is objected, that the title is in some other person: and in these cases, if the person in whom the title is thus stated has had the pernancy of the tithes claimed, the bill is in effect an ejectment bill; and where the legal title of the plaintiff is disputed on bills, which may be properly called ejectment bills, it is not the ordinary practice of courts of equity to make any decree whatever, except for the purpose of assisting the trial at law, where such assistance may be necessary. Thus, where a bill was filed by Dr. Scott, as rector of Simonburne, claiming tithes of corn and hay against the defendants, several of whom were occupiers of lands within the parish, and the Aireys were owners of part of the lands, and claimed the tithes of corn and hay of their own lands, and of those occupied by the other defendants; and it appeared that the Aireys, and those under whom they claimed, had received the tithes in question, and made them the subject of settlement for above 160 years, although they could show no original lawful title to such tithes; the Court of Exchequer dismissed the bill, refusing to give the rector any relief, until he had established his title to the tithes at law. And in Edwards v. Lord Vernon, Hil. 21 G. 3, where, to a bill by the spiritual rector, the defence set up was, a title to the tithes under family settlements, and possession for seventy-one years, the Court of Exchequer followed the authority of Scott v. Airey, and dismissed the bill with costs.

See the argument for the appellant in the case of Barnard v. Garmons, Dom. Proc. June 3, 1797; Scott v. Airey, Tr. 19 G. 3; ‖Gwill. 1174; 2 Eag. & Y. 342.‖ See also Strutt v. Baker, 2 Ves. J. 625; ‖Gwill. 1430.‖

In a subsequent case, where Sir Joseph Mawbey claimed, as impropriate rector, tithes of land, of which some of the defendants also claimed the tithes; it was objected that the plaintiff's title was a legal title, and that he must first demand the tithes at law. The Court of Exchequer said it was a question of title, the evidence of possession was doubtful, and a court of equity would therefore not make any decree till the right had been settled at law, the account prayed being merely consequential to the right, and the proper tribunal for the trial of right, if the possession was equivocal, and for construction of deeds under which parties claimed, was a court of law; and although the counsel for the plaintiff pressed to have an issue directed, in order to have the right tried at law, with the assistance of the court, the court refused it, and dismissed the bill.

Mawbey v. Edmead, Hil. 24 G. 3; ‖Gwill. 1265; 3 Eag. & Y. 1326.‖

To a claim by a vicar of the tithe of hay under an endowment, the defendants, the terre-tenants, set up a payment to the vicar in lieu of such tithe. This was holden by the Court of Exchequer to be a bad *modus*, and they thereupon gave judgment for an account of tithes, considering the vicar's claim as established by the payments. But upon a writ of error the House of Lords directed an issue to try the nature of the payments, Lord Mansfield declaring his opinion that on a vicar's title being disputed, unless it is perfectly clear, a court of equity ought not to make a decree without having the fact ascertained by a jury.

Travis v. Oxton, Anstr. 308; 2 Raym. 762.

Where a vicar sued for all small tithes under an endowment, which he produced, and also gave in evidence a decree in the Exchequer for an account of all small tithes in a suit by his predecessor, in the reign of Charles the First, yet as the endowment was not supported by usage, &c.,

the decree was not binding, the patron not being a party, and as it had never been acted under, the Court of Exchequer thought the case not so clear as to warrant a decree in favour of the vicar, and directed an issue to try whether he was entitled under the endowment or not; and that decision was affirmed in the House of Lords.

Carr v. Henton, Anstr. 313; ‖Gwill. 1258; 7 Bro. P. Ca. 140; 3 Eag. & Y. 1320;‖ March 5, 1788.

The account being consequential to the legal title, and a rector having *primâ facie* the title to all the tithes in him, it should seem to follow that, in questions between the rector and vicar, a court of equity cannot make a decree in derogation of the rector's title, merely as consequential to the legal title of the vicar, until that title has been established by the decision of a jury, unless it be most clearly and satisfactorily made out. Perhaps it may be questioned whether a court of equity can decide between rector and vicar, that the former has no title, however clear the proofs may be against it, without the intervention of a jury, if the rector insist upon referring it to that tribunal, any more than they can make a decree without reference to a jury, where the rector demands such a reference, in a question of *modus* between the rector and the owner or occupier of the land. For the *primâ facie* title which gives the rector a right to the discussion of the question in a court of law in one case, should seem to give him the like right in the other case. A vicar should appear to be as much bound to make out his title against that of his rector by pleading and by evidence, as an occupier is to make out his exemption or qualification: they both alike claim in derogation of a common law right.

See the case Garnons v. Barnard, Anstr. 296, and printed case in the House of Lords, June 3, 1797; Bantley v. Walters, 1 Wils. 170. ‖It is now settled, that in questions between the rector and vicar, though the rector is the party suing, he is not entitled, as a matter of right, to an issue. The court will dismiss his bill at once, if the vicar makes out a clear case under his endowment, or by evidence of perception sufficient to found a presumption of an endowment. Dorman v. Curry, 4 Price, 109; Gwill. 1822; 1 Wils. E. R. 46; and see Williams v. Price, 4 Price, 156; Gwill. 1827; Parsons v. Bellamy, 4 Price, 190; Gwill. 1829. It seems that a vicar is not entitled to an issue as of course. Patch v. Dalton, 6 Price, 232; Gwill. 1938.‖

It has, indeed, been urged, that a decree in favour of the vicar for an account does not bind the right, and therefore it is not necessary for the court to direct an issue. But it may be very much doubted, whether such a decree would not in effect bind the right: for the distinction which has been set up between decrees binding the right, and decrees not binding the right, has been confined to a very different case; namely, where a defendant sets up a defence by way of *modus* to a bill for tithes, which prays an establishment of the right, as well as an account; and the defendant in his answer has made some mistake in laying the *modus*, so that the court cannot upon those pleadings direct an issue. There, the court, unable to direct an issue, for want of sufficient matter on the record, has made a decree for an account only, to give the defendant an opportunity of trying his title upon a future suit. And most clearly such a decree cannot be pleaded in bar to a bill for establishing the *modus*. But if the decree for an account does not in general bind the right, then this absurdity might follow, that the court might from time to time make similar decrees, without directing any issue to try the fact of title, upon the allegation that no one of such decrees actually binds the right.

Collins v. Gough, Dom. Proc. 16 Feb. 1785.

(Bb) Of suits in Equity for Tithes.

‖ A court of equity may, in general, decide conclusively in the first instance, in tithe-suits, as well as others, without directing an issue. The direction of an issue is discretionary, in order to inform the conscience of the court.

Bullen v. Michel, 2 Price, 399; and see Hawtrey v. Daniel, 7 Bro. P. C. 21; Short v. Lee, 2 Jac. & W. 464; Gwill. 1998; Fisher v. Lord Graves, 1 M'Clel. & Y. 362; 3 Eag. & Y. 1180; Sanders v. Longden, 4 Price, 117; Gwill. 1824.

Where the effect of certain ancient documents was such as to create an equivocal case, the court directed an issue, in order that more satisfactory information might be furnished than could be obtained from depositions on paper.

Leathes v. Newitt, 4 Price, 355; 8 Price, 562.

So, where the case depended on inference to be drawn from a comparison of conflicting testimony, the court would not draw the inference without reference to a jury.

Taylor v. Cook, 8 Price, 650; Stokes v. Edmeads, 1 M'Clel. & Youn. 436.

It is equally in the discretion of the court to grant or refuse a new trial; and it may order evidence to be received, though not strictly admissible, on a trial at law; and it will send the issue down as often as the result is unsatisfactory; and it will not grant a new trial, merely on the ground that evidence not strictly admissible has been received, if, independently of such evidence, the court is satisfied with the verdict; nor on the ground of the rejection of admissible evidence, if, taking such evidence into consideration, it is satisfied the verdict ought still to stand.

Bowsher v. Morgan, 2 Anst. 404; Potts v. Durant, 3 Ibid. 797; Barnard v. Garnons, 7 Bro. P. C. 105; Foxcraft v. Paris, 5 Ves. 221; Sanders v. Longden, 4 Price, 117; White v. Lisle, 4 Madd. 214.

Where the rector sues as plaintiff, he is in general entitled to an issue as matter of right, but not where he is defendant; and where the plaintiff's claim as rector is defeated, by the defendant's clearly proving himself entitled to the rectorial tithes, there the plaintiff is not entitled to an issue: he is only entitled of right to an issue where the defence amounts to a recognition of his *primâ facie* right as rector.

Williams v. Price, 4 Price, 160; Cockburn v. Hughes, 3 Price, 430; Wilmot v. Hellaby, 5 Price, 355; Gwill. 1874; and see Barker v. Barker, Wightw. 398; Gwill. 1695; Strutt v. Baker, 4 Gwill. 1430; 2 Ves. J. 625.‖

A suit may be maintained in a court of equity for an account of tithes in London, notwithstanding the statute and decree of 37 H. 8, c. 12; for an act of parliament creating a special jurisdiction never ousts the jurisdiction of the courts of Westminster Hall. Nor is it true, that if a statute creates a new right, one cannot go beyond it: for if a statute creates a new right, it creates a new duty: if the performance of that duty requires the interference of a court of equity, the execution of the statute must of course be with the necessary circumstances.

Canons of St. Paul's v. Crickett, 2 Ves. J. 563; ‖Gwill. 1425; 2 Eag. & Y. 417. As to the question, whether the decree under the statute 37 H. 8, c. 12, must now be presumed to be enrolled, see Owen v. Nodin, M'Clel. 239; 3 Eag. & Y. 1149; M'Dougall v. Young, 2 Carr. & Pa. Ca. 278; M'Dougall v. Purrier, 2 Eag. on Tithes, 458; and Tyrwhitt's Argument on the non-enrolment of the decree, &c. (1823), and *antè*.‖

(Cc) Of a Suit in a Court of Equity to establish a *Modus*, or a customary Manner of setting out Tithes.

It was formerly doubted, whether a bill could be filed in a court of equity to establish a *modus* by prescription, or a customary manner of setting out tithes; and such bills have frequently been dismissed.

1 Vern. 185; Nels. Ch. R. 10; 1 Chan. Ca. 187.

But it is now the practice of courts of equity to retain such bill, which is in reality no more than a bill to perpetuate the testimony of witnesses as to the *modus* or customary manner of setting out tithes.

1 Vern. 485; 1 Eq. Ca. Abr. 367; 2 P. Wms. 565.

If a bill in equity be filed against the lessee of a rector, vicar, or impropriator, to establish a *modus*, the rector, vicar, or impropriator must be a party; for a court of equity will never bind the right of any person, without giving him an opportunity of being heard.

Bunb. 70, Glanville v. Trelawney; ‖Gwill. 622; 1 Eag. & Y. 753.‖

The day on which the *modus* is to be paid must be expressly set out in a bill in equity to establish a *modus*.

Bunb. 328, Gibb v. Goodman. ‖But it seems sufficient to state it *on or about* a particular day. Richards v. Evans, 1 Ves. 30; Gwill. 802; Baker v. Athill, 2 Anst. 491; Gwill. 1422; Atkins v. Hatton, 4 Wood, 410; Atkins v. Willoughby, 4 Wood, 419; and see *antè*.‖

But, if the setting out of the day of payment be omitted in a bill to establish a *modus*, the court will give the plaintiff leave to amend his bill, upon paying the costs of the day.

Bunb. 199, Blackett v. Finny.

A court of equity never establishes a *modus*, or a customary manner of setting out tithe, until the validity thereof has been tried at law; in case a party, whose right may be thereby affected, desire to have it so tried.

Sel. Ca. in Chan. 53, Webber v. Taylor; ‖Gwill. 656; 1 Eag. & Y. 802; Robinson v. Barroby, Gwill. 1173; 3 Eag. & Y. 1283; Markham v. Huxley, Gwill. 1499.‖

If a bill in equity be filed to establish a *modus*, and the *modus* be not proved in the manner it is set out in the bill; yet, if the defendant admit that there is a *modus*, and the difference betwixt him and the plaintiff be only as to the extent of the *modus*, the court will direct an issue at law to try how far it does extend, with liberty to endorse the *postea* as it may be necessary.

Bunb. 340, Laithes v. Christian. ‖See Provost v. Bennett, 2 Price, 272; Gwill. 723; 3 Eag. & Y. 726; Williams v. Williams, Gwill. 1165; 3 Eag. & Y. 1276; Bennett v. Read, Gwill. 1291; 3 Eag. & Y. 1338.‖

‖A bill to establish a *modus* cannot be brought on a simple demand of tithes being made by the parson, without any suit for enforcing payment.

Coventry v. Burslem, 2 Anstr. 567, n.; Gordon v. Simkinson, 11 Ves. 509; De Whelpdale v. Milburn, 5 Price, 483; Hales v. Pomfret, Dan. 141; Gwill. 1884.

But if an action is brought by the lessee of tithes for subtraction, it is a sufficient ground for such a bill.

Stawell v. Atkyns, Anstr. 564; Gwill. 1434; and see Wollaston v. Wright, 3 Anstr. 801.

The patron and ordinary are necessary parties to such a bill; and therefore the defendant, in a suit in equity for tithes, cannot set up moduses, as established by a previous decree, to which the patron and ordinary were not parties.

Jenkinson v. Royston, 5 Price, 495; and see Cook v. Butt, 6 Madd. 55; Gwill. 2029.‖

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A bill to establish a farm *modus*, setting forth the abuttals of the farm, and averring that the *modus* had immemorially been paid for the *said* farm, is sufficient, without expressly averring it to be an ancient farm.

Lord Stawell v. Atkyns, Anstr. 564; ‖Gwill. 1434; 2 Eag. & You. 410; and see Scarr v. Trinity College, 3 Anstr. 760; Gwill. 1445; 2 Eag. & You. 429.‖

But a bill to establish a *modus* for every ancient farm, stating the whole parish to consist of ancient farms, but not setting forth the abuttals of each, is bad.

Scott v. Allgood, Anstr. 16; ‖Gwill. 1369; 3 Eag. & You. 1372. In this case the *modus* was stated in the same terms in the answer to the original bill for tithes; and it was held well pleaded in the answer but ill in the bill to establish the *modus*; this being an application for the extraordinary assistance of the court.‖

(Dd) Of an Action upon the Statute against Subtraction of Tithes.

An action lay at the common law for tenths; because a layman was at all times capable of having tenths.

Bro. *Dism.* pl. 1, pl. 5, pl. 6; Cro. Eliz. 599, 763.

An action also lay at the common law against the person carrying away tithe which had been legally severed; for by the severance it became a lay-chattel.

Bro. *Dism.* pl. 6; Cro. Eliz. 607; Latch. 8; 3 Bulstr. 337.

But no action lay at the common law for subtraction of tithe; the remedy being only in the spiritual courts.

Bro. *Dism.* pl. 1, pl. 5, pl. 6, pl. 10; 2 Rep. 44; Vaugh. 195.

Coke, C. J., was of opinion, that a power is given by the 32 H. 8, c. 7, to sue for subtraction of tithe in the temporal courts.

2 Inst. 141.

But this is denied by Vaughan, C. J.; and it appears, upon looking into this statute, that the power given to sue for tithe in a temporal court is only a power to sue for an estate in tithe.

Vaugh. 195, Holden v. Smallbrooke.

Nay, so far from giving a power to sue in temporal courts for subtraction of tithe, it is by § 8, of this statute, expressly provided, "That it shall not extend to give any remedy, cause of action, or suit, in the temporal courts, against any person who shall refuse to set out his tithes, or who shall detain, withhold, or refuse to pay his tithes."

By the 2 & 3 Ed. 6, c. 13, § 1, it is enacted, "That every of the king's subjects shall from henceforth truly and justly, without fraud or guile, divide, set out, yield, and pay all manner of predial tithes in their proper kind, as they rise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of this act,(*a*) or of right or custom ought to have been yielded or paid; and that no person shall from henceforth take and carry away any such tithes, which have been yielded or paid within forty years, or of right ought to have been yielded or paid in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the same tithe with the parson, vicar, or other owner, proprietor, or farmer of the same tithes; under the pain of forfeiture of the treble value of the tithes so taken or carried away."

[(*a*) Where the declaration stated, that tithes were within forty years next before the statute *of right yielded and payable*, and yielded and paid, evidence that the land

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had always been remembered to be in pasture, and had never within memory paid any tithe, was not thought sufficient to defeat the action. Mitchell v. Walker, 5 Term R. 260. *Secùs*, where there was no evidence of any payment of tithe, and the declaration only stated that tithe had been yielded and paid forty years before the statute. Lord Mansfield v. Clarke, Ibid. 264. ‖A declaration on the statute omitting to allege that the tithes have been of right yielded and payable, and yielded and paid within forty years before the passing of the statutes, is defective, and not cured by verdict. Butt v. Howard, 4 Barn. & A. 655.‖

‖Where the plaintiff alleges in a declaration on the statute, that a particular species of tithes was granted, yielded and paid, and of right due and payable, on the land forty years before the making of the statute, he is not bound to prove that the particular article was cultivated there at that time, but it is for the defendant to prove the contrary; and, in the absence of such proof, the court will not presume that they were not cultivated, although the articles are such as are generally considered to be of subsequent introduction into this country.

Hallewell v. Trappes, 2 New Rep. 173.

By the fourth section of the above statute, 2 & 3 Edw. 6, c. 13, § 4, it is provided and enacted, that no person shall be sued or compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws of the realm, or by privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real.

A prescription or *modus* must be good *in law*, as well as established *in fact*, in order to exempt lands from tithe within this section; the validity of it may be tried in an action for treble value on this statute, and unless some certain and good *modus* is established, the rector cannot be ousted of his common law right; proof of varying modes of payment, in lieu of tithes, is not sufficient for that purpose; and the rector may recover on his common law right, even although he himself tries to establish a customary mode of tithing, and fails in the proof of it.

Phillips v. Davies, 8 East, R. 178; Blundell v. Mawdesley, 15 East, 641.‖

An information *qui tam* does not lie for the forfeiture given by this statute; because no part of the forfeiture is given to the king.

2 Inst. 650; 8 Rep. 119; Cro. Eliz. 621.

But it is said that an information *qui tam* may be upon this statute, if the forfeiture be waived; for that the king would then be entitled to a fine.

Hetl. 121, Luvered v. Owen; ‖1 Eag. & Y. 368.‖

Although the penalty given by the 2 & 3 E. 6, c. 13, be not a certain sum of money, it has been holden that an action of debt lies upon the statute.

Cro. Eliz. 621, Johns v. Carne.

‖The statute is considered remedial rather than penal; and, therefore, the courts will grant a new trial in an action upon it, if the verdict be against evidence.

Lord Selsea v. Powell, 6 Taunt. 297.‖

If the owner of corn, before the corn is severed, grant it to a stranger, with an intent to defraud the parson of his tithe, this is such fraud and guile, that an action upon the statute will lie against the first owner of the corn.

2 Bulstr. 184, Moyle v. Ewer; 2 Inst. 649.

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If a man, who has fairly set out his tithe, do in a short time after carry away the same, this is fraud and guile within the meaning of the statute.

2 Inst. 649.

In an action of debt upon the statute, the plaintiff declared for the subtraction of mixed tithes, as well as predial ones, and had a verdict as to the whole. It was insisted, that an action does not lie upon the statute for the subtraction of any tithes except predial ones; and the judgment was arrested.

Brownl. 65, Pain v. Nicols.

||The action only lies for such predial tithes as are capable of being set out, and therefore not for the subtraction of agistment tithe.

Scarr v. Trinity College, Camb., 3 Anst. 760; Gwill. 1445; 2 Eag. & Yo. 429.||

An action is not by the express words of the statute given to a farmer of tithes.

But it has been holden, that as every farmer of tithes has a right to the tithes, the remedy given by the statute ought to be extended by equity to every such farmer.

Moor, 915; Day v. Peckwell, Cro. Ja. 70; ||Gwill. 221; 1 Eag. & Y. 154; Wyburd v. Tuck, 1 Bos. & Pul. 458.||

An executor may bring an action upon the statute for subtraction of tithe due to his testator; this case being within the equity of the 4 E. 3, c. 7, by which an action is given to an executor for the goods of his testator, which were carried away during the life of his testator.

1 Ventr. 30; Moreton's case, Sid. 407; 1 Vern. 60; ||Gwill. 1578; 1 Eag. & Y. 480.||

||But an executor cannot recover the penalty of treble value.

Anon., 1 Vern. 60; Gwill. 532; 1 Eag. & Y. 540.||

An action does not lie upon the statute against an executor; for the treble value thereby given is by way of punishment for the personal wrong; and an executor is not answerable for a personal wrong done by his testator.

Sid. 181; Weekes v. Trussel, Sid. 407.

In an action upon the statute against Hancock and two others, the defendants all joined in the plea of *nil debent*. The verdict was, that Hancock owed eighteen pounds; but that the other two owed nothing. It was moved in arrest of judgment, that the action ought not to have been a joint action; but after great debate and deliberation; the court were unanimously of opinion, that the action was well brought; for that, as it is founded upon a tort and not upon a contract, one of the defendants may, as is frequently done in other actions founded upon torts, be found guilty, and the others may be acquitted.

Comb. 361, Bastard v. Hancock; ||1 Eag. & Y. 614.||

In an action upon the statute, the plaintiff declared that the defendant was occupier of the land, upon which the tithe arose, from the tenth day of March, for the space of six months; that in the August following, he cut the corn growing thereupon; and that after the expiration of his term, he carried away the corn without having set out the tenth part thereof. An objection was taken, that it appeared, from the plaintiff's own showing, that the defendant was not occupier of the land at the time of the sup-

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posed subtraction of the tithe: but it was holden, that as he was the owner of the corn at that time, the action was well brought.

Cro. Ja. 324, Kipping v. Swaine; ‖Gwill. 258; 1 Eag. & Y. 219.‖

It is not necessary for the person, who brings an action upon the statute, to set out a title to the tithe in question; because, as the action is in the nature of an action of trespass founded upon a tort, it is sufficient to show a possession of the tithe in the plaintiff.

2 Lev. 1; Cro. Ja. 68, 361, 437; 1 Ventr. 126; 2 Bulstr. 67.

‖Mere evidence of an incomplete treaty by the parishioners with a proprietor, for a composition, is not sufficient to establish his possession of the tithes in an action on the statute.

Wyburd v. Tuck, 1 Bos. & P. 458.

But proof of payment of a composition by the parishioner to the proprietor, in the preceding year, is sufficient.

Gamson v. Wells, 8 Taunt. 542.

And the plaintiff's title to the tithes cannot be disputed after a general payment of money into court.

Broadhurst v. Baldwin, 4 Price, 58.‖

If a certain lease of the tithe be declared upon in an action upon the statute, and the jury find a different lease, the variance is not fatal, because the allegation of the lease is only inducement to the action; the wrong in carrying away the tithe being the ground thereof.

Cro. Ja. 328; Wheeler v. Haydon, 2 Bulstr. 86; ‖Gwill. 258; 1 Eag. & Y. 219. If one only of two joint-tenants of tithes execute an assignment of a lease of the tithes, *qu.* if the person claiming under such lease can maintain an action for not setting them out. See Wyburd v. Tuck, 1 Bos. & Pul. 458; Gwill. 1517.‖

‖But it seems that a lessee and farmer must not state himself in the declaration as owner and proprietor of the tithes.

Stevens v. Aldridge, 5 Price, 334; Gwill. 1865.

It is necessary for the person who brings an action upon the statute to show, that the defendant was one of the king's subjects at the time of subtracting the tithe.

Cro. Ja. 324, Kipping v. Swaine.

But, if it be alleged that the defendant was occupier of the land at the time of subtracting the tithe, it is well enough; because it may be fairly inferred that he was one of the king's subjects at that time.

Hardr. 173, Phillips v. Kettle.

The declaration in an action upon the statute must show, that the defendant had made no agreement with the plaintiff for the tithe before he carried it away; for the statute has these words, *or otherwise agreed for the same tithe.*

Carth. 304, Alston v. Buscough, Cro. Ja. 70. ‖But the objection was held to be cured by verdict; since, if an agreement had been shown, the plaintiff could not have recovered. But *quære* as to this; and see Butt v. Howard, 4 Barn. & A. 655; Gwill. 2030; 3 Eag. & Y. 1061.‖

In an action upon the statute, the plaintiff declared for a certain quantity of grain. It was objected, that the word grain, which comprehends seeds of divers sorts, is of too general signification, and that the particular kind of grain ought to have been alleged: but the declaration was holden to be good; for that the word grain does, in its usual signification, mean corn.

Sty. 103, 108; Southcot v. Southcot; ‖Gwill. 884.‖

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It is sufficient, in an action upon the statute, to allege the value of the whole tithe subtracted, without showing the quantity or value of the particular kinds of tithes.

Cro. Ja. 438, Sanders v. Sanders.

The plaintiff may recover, in an action of debt upon the statute, notwithstanding the sum found by the verdict be less than the sum alleged in his declaration to be due; for although it be in the general true, that the plaintiff cannot recover, in an action of debt, a less sum than he declares for, he may, as no certain penalty is given by the statute, recover in this action the value of the tithes subtracted.

Cro. Ja. 498, Pemberton v. Shelton; ‖ 1 Eag. & Y. 297.‖

The statute of limitations cannot be pleaded in bar to an action upon the statute, because the occupier is considered as a bailiff or receiver; and the statute of limitations is no bar to a demand upon such persons.

Cro. Car. 513; Talory v. Jackson, Bunb. 213.

‖But by the 53 G. 3, c. 127, § 5, it is enacted, that no action shall be brought for the recovery of any penalty for the not setting out tithes; nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due.‖

The more proper plea, in an action of dent upon the statute, is *nil debet:* but it has been holden, that as the action is founded upon a tort, not guilty is a good plea.

2 Inst. 651; Moor, 914; Carth. 361.

If a defendant, against whom an action upon the statute is brought, would avail himself of a *modus* by deed, the deed must be pleaded; and the deed is pleadable, although the date thereof be beyond time of memory, and it was not allowed in a court of eyre; for an allowance before justices in eyre was not necessary in the case of a private deed.

2 Mod. 321, 322, James v. Trollope; ‖ S. C. Pollex. 623; Skin. 51, 239; 2 Show. 439; Eag. & Y. 532.‖

A prescription *in non decimando* cannot be pleaded in the negative to an action upon the statute; but the plea must be, that the defendant, and all those whose estate he has, have, for time whereof the memory of man is not to the contrary, enjoyed the premises without paying tithe for the same.

Bro. *Preser.* pl. 17.

If the plea to an action upon the statute be, that the premises of which tithe is claimed were discharged thereof in the hands of an abbot, it must be shown in what manner they were discharged; for, as a discharge of tithes is against common right, it shall be intended, unless the contrary appear, that the discharge was personal.

1 Jo. 6; Slade v. Drake, 1 Lev. 185; ‖ Gwill. 394; 1 Eag. & Y. 320.‖

If a discharge of tithe, by reason of unity of possession in the hands of an abbot and his successors, be pleaded to an action upon the statute, the unity of possession is traversable.

Cro. Eliz. 584, Button v. Long.

(Ee) Of Recovering the Value of small Tithes subtracted.

In an action upon the statute, the plaintiff was not heretofore in any case entitled to costs of suit.

2 Inst. 651.

But by the 8 & 9 W. 3, c. 11, § 3, it is enacted, "That in all actions of debt upon the 2 & 3 E. 6, c. 13, wherein the single value found by the jury shall not exceed the sum of twenty nobles,(*a*) the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall recover his costs of suit."

‖(*a*) 6*l.* 13*s.* 4*d.*‖

‖ The language of this statute does not apply to a case where the defendant suffers judgment by default. In a case where the declaration contained counts for the treble value, for tithes bargained and sold, and on an account stated, and the defendant suffered judgment by default, and the jury assessed the plaintiff's damages at £171, 4*s.* 9*d.* on the count for treble value, and £9 for single value on the other counts, but omitted to find costs; the court ordered the return of the inquisition to be amended, by inserting nominal damages as to the last counts, on which costs *de incremento* might be added.

Ball v. Hodgetts, 1 Bing. 182; 7 Moo. 602; Eag. & You. 1089; and see Barnard v. Moss, 1 H. Bl. 107; 2 Eag. & You. 357.‖

It has been holden, that the defendant, in an action upon the statute, is not entitled to costs; because as the action is not an action of debt upon a specialty, nor an action for a personal wrong done immediately to the plaintiff, the wrong in this case arising from a non-feasance and not from a mal-feasance, it is not within the meaning of the 23 H. 8, c. 15, by which costs are in divers cases given to a defendant.

2 Inst. 651.

But by the 8 & 9 W. 3, c. 11, § 3, it is enacted, "That if the plaintiff, in any action of debt upon the 2 & 3 E. 6, c. 13, shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs of suit."

(Ee) Of Recovering in a summary Way the Value of small Tithes subtracted.

By the 7 & 8 W. 3, c. 6, § 1, it is, for the more easy recovery of small tithes, where the same do not amount to above the yearly value of forty shillings from any one person, enacted, "That if any person shall subtract or withdraw, or fail in the payment of such small tithes, by the space of twenty days after demand thereof, that then it shall be lawful for the person, to whom the same shall be due, to make his complaint in writing to any two justices of the peace within the county or place where the same shall grow due; neither of which justices is to be patron of the church whence the said tithes arise, or any ways interested in such tithes."

But by § 6 it is provided, "That no complaint shall be heard as aforesaid, unless it shall be made within two years after the same tithes become due."

And by § 13 it is provided, "That no person, who shall begin any suit for the recovery of such small tithes in the Court of Exchequer, or in any ecclesiastical court, shall have any benefit of this act for the same matter."

By § 2 it is enacted, "That the said justices shall summon in writing under their hands and seals, by reasonable warning, every person against

(Ee) Of recovering the Value of small Tithes subtracted.

whom any complaint shall be made as aforesaid, and after his appearance, or upon default of appearance, the said warning being proved before them upon oath, the said justices shall proceed to hear and determine the said complaint, and shall in writing under their hands and seals adjudge the case, and give such reasonable allowance for such tithes as they shall judge to be just, and also such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just."

And by § 4, the justices are empowered to administer an oath to any witness produced.

But by § 8 it is enacted, "That if any person complained against shall insist upon any prescription, composition, *modus decimandi*, or other title whereby he ought to be discharged of tithes; and shall deliver the same in writing to the said justices; and shall give to the party complaining sufficient security, to pay all such costs as shall be given against him upon a trial at law, in case the said title shall not be allowed; that then the said justices shall forbear to give judgment."

By § 3, "A distress is given, in case of refusal or neglect, by the space of ten days after notice given to pay such sum as upon such complaint shall be adjudged as aforesaid."

By § 12 it is enacted, "That the said justices shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they find the complaint false and vexatious."

By § 5 it is provided, "That this act shall not extend to tithes within the city of London, or in any other place where the same are settled by act of parliament."

By § 7, an appeal is given to the sessions, and it is moreover enacted, "That if the justices there present, or the majority of them, shall confirm the judgment of the two justices, they shall decree the same by order of sessions, and proceed to give such costs against the appellant as to them shall seem just and reasonable."

By the same section it is enacted, "That no proceeding or judgment, had by virtue of this act, shall be removed or superseded, by any writ of *certiorari*, or other writ out of his majesty's courts at Westminster, or any other court whatsoever, unless the title to such tithes shall be in question."

‖By the 53 G. 3, c. 127, two or more justices are authorized to determine all complaints touching tithes, oblations, and compositions subtracted, where the same shall not exceed *ten pounds* in amount, in all such cases and by all such means, and subject to such provisions and remedies, by appeal or otherwise, as are contained in the 7 & 8 W. 3, c. 6, respecting tithes not exceeding forty shillings; and one justice shall be competent to receive the original complaint and summon the parties to appear before two or more justices.

A party summoned under the above acts, and who resists the payment of tithe on the ground of *modus*, under the eighth section of the 7 & 8 W. 3, c. 6, must set up the *modus* before the justices in the first instance; and if he neglect to do so, and an order is made by the justices, he cannot on appeal to the sessions give evidence of the *modus;* and it would seem that the eighth section takes away from the justices the power of trying a question of *modus* in any case.

Rex v. Jeffreys, 1 Barn. & C. 604; 2 Dow. & Ry. 860; Gwill. 2065.‖

(Ff) Of recovering Tithes due from Quakers.

By the 7 & 8 W. 3, c. 34, § 4, it is enacted, "That where any Quaker shall refuse to pay or compound for his great or small tithes, it shall be lawful for the two next justices of the peace of the same county, other than such justice of the peace as is patron of the church or chapel to which the said tithes belong, or any ways interested in the said tithes, upon the complaint of the person who ought to have and receive the same, by warrant under their hands and seals to convene before them such Quaker, and to examine upon oath, which oath the said justices are empowered to administer, or in such manner as by this act is provided, the truth and justice of the said complaint, and to ascertain what is due from such Quaker to the party complaining, and by order under their hands and seals to direct the payment thereof, so as the sum ordered as aforesaid do not exceed £10; and upon refusal by such Quaker to pay according to such order, it shall be lawful for any one of the said justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, by distress and sale of the goods of such offender."

By the same section it is enacted, "That any person finding himself aggrieved by any judgment given by such two justices of the peace, may appeal to the next general quarter-sessions, and the justices of the peace there present, or the major part of them, shall proceed finally to hear and determine the matter; and if the justices then present, or the major part of them, shall find cause to continue the said judgment, they shall then decree the same by order of sessions, and shall proceed to give such costs against the appellant as to them shall seem just and reasonable."

And by the same section it is enacted, "That no proceeding or judgment, had by virtue of this act, shall be removed or superseded by any writ of *certiorari*, or other writ, out of his majesty's courts at Westminster, or any other court whatsoever, unless the title to such tithes shall be in question."

By the 1 G. 1, st. 2, c. 6, § 2, the like remedy is given for the recovery of all tithes, and all other ecclesiastical dues, from Quakers, as is by the 7 & 8 W. 3, c. 34, given for tithes to the value of ten pounds.

And it is thereby further enacted, "That any two or more justices of the peace of the same county or place, other than such justice as is patron of the church or chapel to which the said tithes or dues belong, or any ways interested in the said tithes, upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or other person who ought to have, receive, or collect any such tithes or dues, are hereby required to summon in writing under their hands and seals, by reasonable warning, such Quaker or Quakers against whom such complaint shall be made; and after his or their appearance, or upon default of appearance, the said warning or summons being proved before them upon oath, to proceed to hear and determine the said complaint, and to make such order therein as in the said act is limited or directed; and also to order such costs and charges, not exceeding ten shillings, as upon the merits of the cause shall appear just; which order shall and may be appealed to, and on such appeal may be reversed or affirmed by the general quarter-sessions of the county or place, with such costs and remedy for the same, and shall not be removed into any other court, unless the title to such tithes shall be in question, in like manner as in and by the 7 & 8 W. 3, c. 34, is limited and provided."

‖By the 53 G. 3, c. 127, § 6, the provisions of the two statutes 7 & 8

(Gg) What Remedy an Occupier has, &c.

W. 3, c. 34, § 4, and 1 G. 1, stat. 2, c. 6, § 2, are extended to any value not exceeding *fifty pounds;* and one justice is made competent to receive the original complaint, and summon the parties to appear before two or more justices.‖

(Gg) What Remedy an Occupier has, when the Person entitled to Tithe does not fetch it away in a reasonable Time.

If the person entitled to the tithe of milk do not fetch it away before the next milking-time, the parishioner may pour it upon the ground; because he may then have occasion for the pail, or other vessel, in which it was set out.

Bunb. 73, Dodson v. Oliver.

Although a predial tithe be not fetched away in a reasonable time by the person entitled thereto, the occupier of the land, upon which it is set out, cannot justify the distraining thereof damage-feasant; but he may have an action for the damage sustained by its lying too long upon the land.

3 Bulstr. 337, Mountford v. Sidley; Latch, 8. ‖See 8 Term R. 72.‖

The occupier of the land, upon which tithe is set out, cannot justify the putting of his cattle upon the land, before the tithe is fetched away; for it is probable, that the person entitled thereto would sustain more damage by having his tithe destroyed by the cattle, than the occupier would by being deprived for some time of the use of his land: and it is much more reasonable to leave the occupier to his remedy by action, than to suffer him to judge when the tithe has lain there too long.

Ld. Raym. 187, Shapcott v. Mugford, (2d edit.,) 1765; Ld. Raym. 198; Shapcott v. Mugford, Com. 24.

‖This doctrine is confirmed by a modern case, in which Lord Kenyon also said that the occupier might distrain the tithes damage-feasant.

Williams v. Ladner, 8 Term R. 72; and see Baker v. Leathes, Wightw. 113.‖

But, if the person entitled thereto have neglected to fetch away tithe in a reasonable time, and cattle, either of the occupier of the land upon which the tithe is set out, or of a stranger, do without the default of the occupier come upon the land, and destroy the tithe, the loss must fall upon the person who neglected to fetch it away.

2 Leon. 101, Bennet v. Shortwright; Cro. Eliz. 206.

An action of trespass does not lie against the person entitled to tithe for not having fetched it away in a reasonable time; because the injury to the occupier of the land does not arise from a mal-feasance but from a non-feasance.

Latch, 8, Stilman v. Chanot; Ld. Raym. 189.

But the remedy of the occupier of the land, in case the tithe be not fetched away in a reasonable time, is by an action upon the case.

3 Bulstr. 337; Mountford v. Sidley, Latch, 8; Ld. Raym. 188.

An action for not having fetched away tithe in a reasonable time does not lie, unless the tithe were set out by a person who had some colour of title to the land upon which it arose; because, as the severance of tithe by a stranger does not vest such a property in the person entitled thereto, as to enable him to maintain an action against a person who afterwards carries it away, it is not reasonable that he should be liable to an action for not having fetched it away.

3 Bulstr. 337, Mountford v. Sidley; Latch, 8.

(Gg) What Remedy an Occupier has, &c.

Before the occupier of the land can maintain an action against the person entitled thereto for not having fetched away tithe in a reasonable time, he must give notice of its being set out; because, as the former was not obliged to give notice at what time he intended to set the tithe out, the latter may not know that it is set out.

1 Roll. Abr. 643, (X), pl. 1.

‖The notice that the tithes are set out, and requiring the parson to fetch them away, must be reasonable according to the circumstances. Where due notices were given to the parson of the setting out of the tithe of fruit and vegetables in a garden, which were accordingly set out; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten, a notice then given to remove the tithe fruits and vegetables within two days, otherwise an action would be commenced against the parson, was held sufficient notice whereon to found an action.

Kemp v. Filewood, 11 East, 358; Gwill. 1649.

The action for not removing tithes will lie not only where the tithes have been set out in the mode prescribed by the common law, or by the special custom of the place, but also where they have been set out in a particular manner agreed on by the tithe-owner and the farmer.

Facey v. Hurdom, 3 Barn. & C. 213; 5 Dow. & Ry. 68; 3 Eag. & You. 1172; and see Pigott v. Bayley, 6 Barn. & C. 16.

If there is no special custom or private agreement, the action cannot be maintained, unless the tithes are set out according to common law.

Moyes v. Willett, 3 Esp. Ca. 31; Gwill. 1526; and see Hooper v. Mantle, 1 M'Clel. 388; Eag. & You. 1162.‖

And after the person entitled thereto has had notice of tithe being set out, he must, before an action can be maintained against him for not having fetched the tithe away, have a reasonable time to fetch it away; and the question, What is a reasonable time? is proper for the determination of a jury.

3 Bulstr. 336, Mountford v. Sidley; Bro. *Dism.* pl. 12; Ld. Raym. 189; Str. 245, 246, South v. Jones; ‖Facey v. Hurdom, 3 Barn. & C. 213; 5 Dow. & Ry. 68; Eag. & You. 1172.‖

UNIVERSITIES.

(A) Universities, what.

(B) Of their Courts and Privileges of Jurisdiction. Wherein,

1. *How they are to demand Conusance.*
2. *By whom it may be demanded.*
3. *At what time it may be demanded.*

(C) Of their Privileges with regard to their Right of Presentation to the Livings of Papists. Wherein,

1. *In what cases they shall present.*
2. *Whom they shall present.*
3. *How their Right of Presentation may be prevented.*
4. *How Trusts made to prevent their Right of Presentation may be discovered.*
5. *How their Right of Presentation may be divested.*
6. *How it may be avoided.*

(A) Universities, what.

By universities in general, we understand those seminaries of learning where youth are sent to finish their education, and to be instructed in the liberal sciences. With us, by universities, are more particularly denoted those two learned bodies of Oxford and Cambridge, which are invested with several peculiar privileges.

[It is, indeed, from their being invested with such privileges, or rather, from their being incorporated, (for they would not otherwise be capable of receiving them,) that they were called Universities; *Universitas* being the proper Latin word for a corporation. Considered as corporations, these learned bodies are merely the creatures of the crown. The power of granting degrees flows from that source; for, if the crown erects an university, the power of conferring degrees is incident to the grant; and in point of fact, they never affected to confer degrees till they were incorporated. They were formerly considered as *ecclesiastical*, or at least as *clerical*, corporations; for they were composed chiefly of ecclesiastics, and *denominatio sumenda a majori;* and they had, as ecclesiastical bodies, *ab initio* ecclesiastical jurisdiction. Hence the claim of the Archbishop of Canterbury to visit them *jure metropolitico*, which was allowed in the reigns of R. 2, H. 4, and Car. 1, and established by parliament in the reign of H. 4. It is now settled, however, that they are merely *lay* corporations, and as such, subject to no visitation, properly so called; the appeal, if any one feels himself aggrieved, being to the Court of King's Bench; which court, as its judgments are revisable by the Lords in Parliament, seems to want that definitiveness of sentence which is essential to visitatorial power. The universities being bodies corporate by prescription, it follows, that it is not competent to the crown, of itself, and without their consent, to make any innovations in their constitution, or to abridge any of those rights which

they enjoy either by prescriptive usage or under old charters; and that they may, like other civil corporations under these circumstances, accept a new charter, in part and upon such terms as they may think proper.

See Sir P. Yorke's argument, 1 Burn's P. L. 420. See also 8 Mod. 163; 3 Burr. 1656; 1 Bl. R. 547; 1 Bl. Com. 481.]

(B) Of their Courts and Privileges of Jurisdiction.

Each of the universities had several powers and privileges by charters from the kings of this realm, particularly one in the eighth of Hen. 4, whereby they were authorized to hold plea of all causes arising within the university according to the course of the *civil law:* but in the opinion of all the judges of England the grant was held *not to be good; for that the king could not by his grant alter the law of the land.* To remedy this and other defects respecting their powers and privileges, a special act of parliament was made in the 13 Eliz., confirming all former letters patent, and all manner of liberties, franchises, &c., which they had held, or of right ought to have enjoyed, &c.

4 Inst. 227; Godb. 201, pl. 287; Archbishop of York v. Sedwick.

By letters patent (not confirmed by parliament) dated thirtieth March, 11 Car. 1, granted to the University of Oxford, their old privileges are explained, and larger granted.

1 Mod. 164, Magdalen College case; Wood's Inst. 548.

Their courts are called the Chancellors' Courts. The chancellors are usually peers of the realm, and are appointed over the whole university. But their courts are kept by their vice-chancellors, their assistants, or deputies: the causes are managed by advocates or proctors.

1 Mod. 164. By charter of 14 Hen. 8, The Chancellor, his commissary, and his deputy, that is, the pro-vice-chancellor, are justices of the peace for the vill of Oxon, county of Oxon and Berks; and their authority does not depend on the common commission only, they being justices of the peace by virtue of their offices.

These courts have jurisdiction in all causes ecclesiastical and civil (except mayhem,(*a*) felony, and freehold,) where a scholar, servant, or minister of the university is one of the parties in suit.

1 Mod. 164, and Cro. Car. 73, Wilcocks v. Bradell. But see the petition against the grant of Hen. 4, in Prinn's Animad. p. 368, 369. (*a*)[The trial of treason, felony, and mayhem, is committed in both universities to the university-jurisdiction in another court; namely, the court of the Lord High Steward of the university. The cognisance of offences of this nature has not been claimed by this court in either university for many years, though instances have unhappily occurred in which the claim might have been made.]

Their proceedings are in a summary way, according to the practice of the civil law; and in their sentences they follow the justice and equity of the civil law, or the laws, statutes, privileges, liberties, and customs of the universities, or the laws of the land, at the discretion of the chancellor.

Cro. Car. 73, Wilcocks v. Bradell; Hetley, 25, Thomas Wilcock's case; Hard. 508, Castle v. Litchfield.

If there be an erroneous sentence in the chancellors' court of the University of Oxford, an appeal lies to the congregation, thence to the convocation, and from thence to the king in Chancery, who nominates judges delegates to hear the appeal.(*b*) The appeal is of the same nature in Cambridge. (*c*)

Wood's Inst. 549; 2 Ld. Raym. 1346, The King v. The Chancellor, &c., of Cambridge. [(*b*) According to Sir Wm. Blackstone, the appeal in the first instance is to

delegates appointed by the congregation; thence to other delegates of the house of convocation; and if they all three concur in the same sentence, it is final, at least by the statutes of the university, according to the rule of the civil law. But, if there be any discordance or variation in any of the three sentences, an appeal lies in the last resort to judges delegates appointed by the crown under the great seal in Chancery. 3 Bl. Comm. 85. (c) The appeal from the vice-chancellor's court in Cambridge is to certain delegates appointed by the senate; but the editor is informed, that from the sentence of these delegates there is no appellate university-jurisdiction.]

As by charter confirmed, as above mentioned, by act of parliament, cognisance is granted to the university of all suits arising anywhere in law or equity against a *scholar*, *servant*, or *minister* of the university, depending before the justices of the King's Bench, Common Pleas, and others there mentioned, and before any other judge, though the matter concern the king: if an *indebitatus assumpsit* is brought by *quo minus* in the Exchequer against a scholar or other privileged person, the university shall have conusance; for the Court of Exchequer is included in the general words.

Cro. Car. 73, Wilcocks v. Bradell; Hard. 505, 508, Castle v. Litchfield. There is some disagreement in the books as to the recital of this charter; in Cro. Car. they are said to have conusance, *ita quod justiciarii de banco regis sive de communi banco, vel justiciarii de assisis non se intromittant.* In Hard. it is said that conusance is given them of all suits, &c., depending before the justices of the King's Bench, Common Pleas, and others there mentioned, and before any other judge, though the matter concern the king. These latter words would, no doubt, warrant the resolution in the case of Castle v. Litchfield; for it is said, that no charter of exemption shall be allowed without these or the like words, *licet tangat nos.* But see Hardr. 189, where it is affirmed, that the exemption granted to the university hath not these words, *licet tangat nos.* And see the following authorities, by which it is held, in opposition to the case of Castle v. Litchfield, That—

If a debtor and accountant to the king sues a scholar by bill in equity in the Exchequer, or if an attorney sues a scholar by writ of privilege, the universities shall not have conusance; for a general grant shall not take away the special privilege of any court.

Hard. 189; Wilkins v. Shalcroft, Lit. R. 304; Oxford Letters Patent, S. P.; 3 Leon. 149; The Lord Anderson's case, 2 Danv. Abr. 164. ‖Welles v. Trahern, Willes, R. 233.‖

But in cases where privilege is allowable, a scholar, &c., cannot waive his privilege, and have a prohibition in the courts of Westminster, for the university by right has the conusance of the plea, where one is a privileged person; and a stranger is forced to sue a privileged person in their courts by reason of that right vested in them.

Cro. Car. 73, Wilcocks v. Bradell; Hetl. 28, Thomas Wilcock's case. This privilege was granted to scholars that their studies might not be interrupted by their being forced to attend suits in other courts.

But a scholar ought to be resident(*a*) in the university at the time of the suit commenced, and no other ought to be joined in the action with him; for in such cases he shall not have privilege.

Hetl. 28, Thomas Wilcocks's case. [(*a*) Actual residence must be certified by the chancellor, Hayes v. Long, 2 Wils. 310; and his certificate must be supported by affidavit. Paternoster v. Graham, 2 Stra. 810; 1 Ld. Raym. 428, S. C.; Boot v. Graham, 1 Barnardist. K. B. 49, 65.] ‖See Thornton v. Ford, 15 East, 634.‖

Though it is said that servants of the university are privileged, yet it has been holden, that a bailiff of a college was not capable of privilege.

Brownl. 74, Carrell v. Paske.

‖But the claim was allowed when it was made on behalf of a proctor, a pro-proctor, and the marshal of the university, though the affidavit of the

latter, describing him as of a parish in the suburbs of Oxford, only verified that he then was and had for fourteen years been a common *servant* of the university called marshal, and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided in the university or was matriculated.

Thornton v. Ford, 15 East, 634.‖

Neither is a townsman entitled to privilege, to exempt him from an office in the town, if he keeps a shop and follows a trade, though he is matriculated as servant to a scholar.(*a*)

2 Vent. 106, The City of Oxford's case. [(*a*) That a townsman so circumstanced was not entitled to the privileges of the university, this case did not determine; for the decision turned upon the matriculation having been collusive, merely for the purpose of procuring an exemption from a corporate office. And it has been lately adjudged, that a college barber at Oxford, though he resides in the city out of the college, is entitled to the privileges of the university. Rex v. Rowledge, Dougl. 531.]

It is to be observed, that though *mayhem*, *felony*, and *freehold* appear as above to be the only causes excepted in the charter, yet it has been held, that in actions for the recovery of the possession of a term, without claiming title to the freehold, they shall have no privilege, because the freehold may come in question.

Cro. Car. 87, 88, Hayley's case; Litt. R. 252, Cripps v. Webb's case.

[Although the charter of the university extends to actions arising in any part of England, yet it cannot intend that scholars, as plaintiffs, shall have the liberty of suing in the university in causes of action arising in any part of England; but, when they are defendants, this privilege extends all over England.

Per Lord Camden, 2 Wils. 311.]

It has been disputed how far the words of the grant entitled them to privilege in matters of equity. And the general principle of construction seems to be, that where chattels only are concerned, or where damages only are to be given, there their privilege is allowable; but, where the suit is for the thing itself, there their privilege cannot be allowed. As in the following cases.

A bill was brought setting forth a contract under seal with the defendant, for making a lease of certain lands in Middlesex, and to have execution of the agreement. The defendant pleaded the privilege of the university, to proceed in all quarrels in law and equity, except concerning freehold; and concluded to the jurisdiction of the court. But Lord Keeper Guildford overruled the plea, because in this case they can only excommunicate or imprison, but cannot sequester lands in Middlesex, and so can give no remedy; and because the charter of the University of Oxford, empowering them to proceed in all pleas and quarrels in law and equity, &c., ought properly to be extended to matters at common law only, or to proceedings in equity that might arise in such cases, and not to mere matters of equity, which are originally such, as to execute agreements in specie.

2 Ventr. 362, Draper v. Crowther. ‖See 1 Vern. 212.‖

So likewise on a bill in Chancery to be relieved against a bond of the penalty of 100*l.* given by the plaintiff's father to the defendant, who pleaded his privilege, that he is a doctor in divinity, scholar and residentiary student in the University of Oxford, and that he ought not to be sued but be

fore the chancellor of that university, or his deputy or commissary for the time being; the plea on debate was overruled.

Fin. R. 45, Williams v. Roberts.

But, on a bill to have a bond delivered up of 100*l.* penalty, the money being paid, defendant pleaded, that he was a privileged person of the University of Oxford, viz., a doctor of laws, and resident there, which the chancellor certified, and demanded conusance of the matter in question as determinable before him, or before the vice-chancellor, &c., and not elsewhere. The court dismissed the bill, and allowed the plea.

Fin. R. 162, Bushby v. Cross.

So likewise, on a bill by administrator for an account of intestate's estate, which defendants had got in their possession, on pretence of some debts due to them from the intestate; defendants pleaded, they are privileged persons of the University of Oxford, and there resident; which the chancellor certified, and demanded conusance of the matter as examinable before him, his vice-chancellor, &c., and not elsewhere. And the plea was allowed.

Fin. R. 292, Powell v. Hine and Adams.

Lastly, on a bill brought in this court for a discovery of the personal estate of Dr. Aldridge, deceased, and an injunction granted thereupon, the University of Oxford claimed *conusance* of the cause, for that both plaintiff and defendant were scholars of the university. And Harcourt, C., ordered the bill to be dismissed, and allowed an exclusive conusance in equity *touching chattels* to the university.

Per Harcourt, Chan. MS. R., Trin. 12 Ann. in Chan., Aldridge v. Stratford, Vin. Abr. (V), 22, p. 11.

It is said, that the chancellor of the University of Oxford, or his vice-chancellor, may inflict ecclesiastical censures of the greater excommunication on offenders even for temporal offences, and certify the excommunication into the High Court of Chancery to obtain the writ *de excommunicato capiendo*, as if the offender had been excommunicated in an ecclesiastical cause and certified by a bishop. The University of Cambridge hath also this privilege.

Wood's Inst. 549.

In the construction of their privileges with respect to the assize of beer and ale, it has been contested that they have not *assisam ipsam*, that is, they cannot appoint another assize than what is set down by statute, but that they have only *custodiam assize*, that is, a power to enforce the execution of it, as well in the price as in the measure.

3 Leon. 214; but see 12 W. 3, c. 11, § 19, which recognises the right of the two universities to size and mark measures for ale and beer; and by a grant of the 29th Ed. 3, the University of Oxford hath the assize and assay of wine and ale, as well as the custody of it. Wood's Inst. 550.

[On a motion for a prohibition to a suit in the vice-chancellor's court against certain brewers, for selling ill beer and false measure, the particular excess of jurisdiction alleged was, the exacting of juratory caution; and it was insisted, that though they have the assize of bread and beer by charter, yet a power to punish by fine, and proceed according to the civil law, cannot be by charter. Holt, C. J.—Before the 14 H. 8, the university had the jurisdiction of a leet, and exercised it in the vice-chancellor's court;

but the charter grants them the power of trespasses, and that over all persons whomsoever, if a scholar be a party. *Adjournatur.*

Rush v. Chancellor, &c., of Oxford, Salk. 343. That both the universities have the jurisdiction of a leet, has been acknowledged in subsequent cases. 3 Burr. 1647; 1 Black. R. 547; Dougl. 537; but whether a tradesman of Oxford, entitled to the privileges of the university as a college servant, but residing without the walls of the college in the city, be therefore exempt from serving the office of constable for the city, is a question which has been moved, but not absolutely determined. Rex v. Routledge, Dougl. 530. It should seem, however, from the language of the court, and the subsequent conduct of the prosecutors in that case, that there can be little doubt that the law is in favour of the exemption.]

Such are their general privileges of jurisdiction; it remains now to consider,

1. *How they are to demand Conusance.*

It is said that conusance may be demanded by *certificate* only, without special pleading upon an *indictment* of a privileged person for an assault and battery.

Wood's Inst. 550.

But it has been holden, that the claim of conusance ought to be entered upon a roll, and an affidavit made to verify the certificate.

2 Stra. 810, Paternoster v. Graham, *per cur.* S. P. 1 Barnard. 49, 65, under the name of Boot and Graham. [The charter, the act of parliament which confirms it, and all the proceedings, so far as they have gone, must be entered on the roll; and, therefore, where the charter and statute were shortly but not fully set forth, and the declaration which had been delivered in the cause was wholly omitted, the claim was disallowed as not made in due form. Leasingby v. Smith, 2 Wils. 406. See the case of Woodcock v. Brooke, Ca. temp. Hardw. 241, an instance of a claim allowed.] ‖And see Browne v. Renouard, 12 East, R. 12.‖

In equity, however, a bill being filed against defendant, a fellow of Exeter College in Oxford, for an account of several sums of money; the chancellor of Oxford *claimed* privilege by instrument in writing. But the Lord Keeper disallowed the claim, saying it must be put in by way of plea. He declared nevertheless that it should *not*(*a*) be on oath, but that it should be sufficient to aver the defendant to be a scholar resident, &c.

1 Cases in Can. 237, Pratt v. Taylor. Lord Keeper added, that in case of outlawry defendant should not be put to aver the plea on oath. [(*a*) Mitf. Ch. Pl. 231, *acc.*]

In some cases the claim of conusance by plea ought to conclude with a traverse: as, in trespass for an assault and battery at B in com. Hertford, the defendant pleads, that he was servant to a scholar in Saint John's College, Cambridge; and that they are to have conusance there. The plaintiff demurs, because the defendant takes no *traverse*, that he was culpable in any place *extra universitatem Cantabrigiæ*, that thereupon they might have taken issue. The whole court were clearly of opinion, that the defendant here ought to have concluded his plea with a traverse.

3 Bulstr. 282, Payn v. Worth.

2. *By whom it may be demanded.*

The vice-chancellor, by his attorney or deputy appointed in writing, may demand it, though the vice-chancellor is but a deputy himself; for a bailiff may properly demand conusance, and upon notice of the patent the court ought to supersede.

Hardr. 505, 510, Castle v. Litchfield; 2 Danv. Abr. 174

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‖And in the vacancy of the office of chancellor, the vice-chancellor may make the claim.

Williams v. Brickenden, 11 East, 543.‖

3. *At what time it may be demanded.*

The rule is that conusance must be demanded the first day; [on the return of the writ, if the cause of action appears therein; if not, then upon the first day given upon the declaration. After full defence made or imparlance prayed, it is too late.]

3 Bl. Com. 298; 2 Wils. 406; 5 Burr. 2823; ‖and see Browne v. Renouard, 12 East, 12.‖

In an action on the case against a member of the University, the bill was of Easter term 11 Anne, and the defendant had an imparlance till the first day of Trinity term following; after which, and before plea pleaded, the University of Cambridge by their attorney demanded conusance, and the claim was disallowed because it was not made the first day.

2 Ld. Raym. 1339, in case of The King v. Cambridge University, *alias* Dr. Bentley's case, cited as so held, Hil. 11 Ann. B. R. Perne v. Manners. [See the cases of Leasingby v. Smith, 2 Wils. 406, and Rex v. Agar, 5 Burr. 2823, where claims of conusance were disallowed as not made in due time.]

‖In an action of assault and battery brought by an attorney against a proctor of the University of Oxford and a jailer there, the chancellor put in a claim of cognisance, after replication and before the rejoinder, and the Court of Common Pleas held on a review of the cases that the claim was not made in time, being after imparlance. On the question also raised, Whether the claim could be made against the privilege of the plaintiff as an attorney, it was therefore unnecessary to give an opinion; but Willes, C. J., expressed an opinion against the claim in such a case, saying, "Whenever this case comes judicially before us, though I shall be as tender of the privileges of the University of Oxford as any man living, having the greatest veneration for that learned body, yet I hope I shall always, as far as I can by law, endeavour to support the common law of the land and that excellent method of trial by juries, upon which all our lives, liberties, and properties depend; and that I shall endeavour, as far as I can, to prevent the encroachment of any jurisdiction whatever that proceeds by another law and another method of trial."

Welles v. Trahern, Willes R. 233, where see the claim stated at length. In Litt. R. 304, the claim was denied in an action by an attorney of C. P. against a member of the University of Oxford.‖

(C) Of their Privileges with regard to their Right of Presentation to the Livings of Papists.(*a*)

1. *In what Cases they shall present.*

3 Jac. 1, c. 5, enacts, that every papist recusant convict, during the time that he shall remain a recusant convict, shall from and after the end of this present session of parliament be disabled to present to any benefice or ecclesiastical living, or to nominate to any free school, hospital, or donative; and shall likewise be disabled to grant any avoidance to any benefice.

‖(*a*) By the act for relief of Roman Catholics, 10 G. 4, c. 7, § 16, it is provided, that nothing therein shall alter the laws in force in respect to presentation to ecclesiastical benefices. See Vol. vii. tit. *Papists*, (C).‖

§ 19. The chancellor and scholars of the University of Oxford shall

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have the presentation, &c., to every such benefice, school, hospital, and donative, in the counties of Kent, Middlesex, Sussex, Surry, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somersetshire, Devonshire, Cornwall, Dorsetshire, Herefordshire, Northamptonshire, Pembrokeshire, Carmarthenshire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire, the city of London, and in every city and town being a county of itself, within the limits of the counties aforesaid.

§ 20. The chancellor and scholars of the University of Cambridge shall have the presentation, &c., to every such benefice, school, hospital, and donative in the counties of Hertfordshire, Cambridgeshire, Huntingdonshire, Suffolk, Norfolk, Lincolnshire, Rutlandshire, Leicestershire, Derbyshire, Nottinghamshire, Shropshire, Cheshire, Lancashire, Yorkshire, Durham, Northumberland, Cumberland, Westmoreland, Radnorshire, Denbyshire, Flintshire, Carnarvonshire, Anglesey, Merioneth, Glamorganshire, and in every city and town being a county of itself, lying within the limits of the counties last mentioned.

By the 1 W. & M., c. 26, § 2, every person refusing to make, or to appear for the making the declaration against transubstantiation, and whose name shall be recorded at the quarter-sessions, is disabled to make any presentation, donation, or grant of avoidance of any ecclesiastical living, as fully as if he were a popish recusant convict, and the chancellor, &c., of the universities shall have the presentation in the respective limits mentioned in the act of 3 Jac. 1, c. 5.

And farther by 12 Ann. c. 14, papists and their children under the age of twenty-one years, not being protestants, though not convicted, and their mortgagees and trustees, shall lose their presentations; and the respective universities shall present.

2. *Whom they shall present.*

By 3 Jac. 1, c. 5, § 21, it is provided, that neither of the universities shall present to any benefice any such person as shall then have any other benefice with *cure of souls;* and such presentation shall be void.

It was agreed that a layman may be presented to a prebend, for *non habet curam animarum*, Cro. Eliz. 79. And for the same reason a dean, archdeacon, prebendary, &c., may be presented or nominated by the university; for their promotion is not a benefice with cure of souls. Vin. Abr. v. 2, p. 5. But see 3 Inst. 155, *contrà*.

3. *How their right of Presentation may be prevented.*

If patron recusant grants the patronage in fee to another, in such case the university shall not have the presentment; and in the same manner, if he grants it in tail for life or years, during the continuance of this grant, he is not patron in possession, and therefore the university shall not present by the words of the statute of 3 Jac. 1, c. 5.

Sir William Jo. 19, Standen v. The University of Oxford and Whitton.

But, if a patron makes a lease for years of an advowson, and afterwards becomes a recusant, the university shall have the presentation, as a future interest given to them.

Sir William Jo. 26, Standen v. The University of Oxford and Whitton, S. P. arg.; 10 Rep. 56 a.

So likewise, if a patron acknowledges a statute merchant, and after be-

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comes recusant convict, and then the statute is extended, the university notwithstanding shall have the presentment.

Sir William Jo. 26, Standen v. The University of Oxford and Whitton, S. P. arg.; 10 Rep. 56 a.

[It was determined by Lord Hardwicke, on the statute of Anne hereafter mentioned, that that statute doth not make the whole trust void, but only the turn upon an avoidance; so that if the party conforms before any avoidance happens, nothing can vest in the universities.

Cottington v. Fletcher, 2 Atk. 155.]

4. *How Trusts made to prevent their Right of Presentation may be discovered.*

Where secret trusts are made to prevent their right of presentation, the following statutes point out a method for discovering such trusts.

By 1 W. & M. c. 26, § 3, trustees of recusants are disabled to present or grant any avoidance of any ecclesiastical living, free school, or hospital, and the respective universities are to have the presentations.

And if any trustee, mortgagee, or grantee of any avoidance shall present, &c., to any such ecclesiastical living, &c., where the trust shall be for any recusant convict, or disabled, without giving notice of the avoidance in writing to the vice-chancellor of the university, to whom the presentation shall belong, within three months after the avoidance, he shall forfeit 500*l.* to the university to which the presentation, &c., shall belong.

§ 7. Persons making the declaration, and taking the oaths before the justices at the quarter-sessions, where their names are recorded, shall be discharged of the disability.

Farther, by 12 Ann. st. 2, c. 14, § 2, presentor is to be examined by the ordinary, whether he be a papist or a trustee for such.

§ 3. Presentee is to be examined upon oath by the ordinary, if he knows, or believes the presentor to be a papist, or a trustee for a papist, or for the children of such, or any other person; and if he answers not directly, the presentation to be void.

§ 4. Universities and their presentees may bring a bill in Chancery for discovery,(*a*) and upon neglecting to answer, the bill to be taken *pro confesso*.

(*a*) A bill founded upon this statute can only be for discovery, not for relief. So determined by Lord Talbot, *suprà*, Vol. vii. p. 393.

§ 5. Patrons and their clerks, contesting the right of the university in *quare impedit*, may be examined in court, or by commission or affidavit, as the court shall think proper, as to secret trusts; and if upon discovery who is the *cestui que trust*, he shall, upon a rule made for him to come into court, or before commissioners, to make the declaration against transubstantiation, neglect so to do, he shall be esteemed convict in respect to his presentation.

It was moved in a *quare impedit*, that the plaintiff claiming right of patronage might be examined upon oath touching secret trusts for papists pursuant to this act, and a commission for such examination was ordered to issue, directed to the three prothonotaries, or any two of them. Barnes, King v. Bishop of Carlisle, and Masters and Scholars of the University of Cambridge. See likewise where the court ordered a commission for the like purpose, and directed the prothonotary to strike the commissioners' names, and to settle the interrogatories. Barnes, Rutter v. Bishop of Hereford and the University of Cambridge.

§ 6. And the answer of such patrons, and the person for whom they are intrusted, and his and their clerks, and their examinations and affidavits

taken as aforesaid by order of any court, or by the ordinary, shall be allowed as evidence against such patron so presenting, and his clerk.

§ 8. No lapse shall incur nor plenarty be a bar, till three months after the answer put in, or the bill taken *pro confesso*, or the prosecution deserted, provided such bill be exhibited before any lapse incurred.

§ 10. Upon confession or discovery of trust, the production of deeds may be enforced.

Lastly, The 11 G. 2, c. 17, § 5, enacts, That every grant of any advowson of any ecclesiastical living, school, hospital, or donative, and every grant of any avoidance thereof, by any papist or person making profession of the popish religion, or any mortgagee or person intrusted for any papist, &c., shall be void, unless such grant shall be made *bonâ fide*, and for a full consideration, to a protestant purchaser, and only for the benefit of protestants; and such grantee shall be deemed a trustee for a papist, and they and their presentees shall be compelled to make such discovery relating to such grants and presentations as by the act 12 Ann. st. 2, c. 14, is directed. And every devise to be made by any papist of any such advowson, &c., with intent to secure the benefit thereof to the heirs or family of such papist, shall be void; and such devisees and persons claiming under such devisees, and their presentees, shall be compelled to discover whether such devisees were not made with the said intent.

‖See Vol. vii. tit. *Papists*, (C).‖

5. *How their Right of Presentation may be divested.*

When once the presentation *pro hâc vice* is vested in the university, though the recusant conforms himself afterwards or dies, yet the university shall present.

10 Rep. 58 a, in the Chancellor, &c., of Oxford University's case.

So likewise if a recusant is attaint of felony or *præmunire*, the interest of the university shall not be divested.

Per Hutton, Sir William Jo. 26, in the case of Standen v. The University of Oxford and Whitton.

6. *How it may be avoided.*

The 1 W. & M. sess. 1, c. 26, § 6, enacts, that the benefice to which persons are presented by the universities for the recusancy of the patron, shall become void in case of absence from the same above the space of sixty days in any one year.

USES AND TRUSTS.

PART I.—OF USES.

A USE at common law was an equitable right which he who conveyed a legal estate to another reserved to himself, upon trust and confidence that the person to whom he so conveyed it, would nevertheless suffer him to take the rents and profits of the land, and that he would execute estates according to his direction.

Gilb. Law of Uses, 175; 1 Rep. 121, Chudleigh's case. See Bac. Tr. 306; Cornish on Uses; Sanders on Uses; 1 Fonbl. Eq. 363; Co. Lit. 272 b.

The *feoffee*, therefore, or *terre-tenant*, (that is, the person to whom the legal estate was conveyed,) had the freehold or sole property in him: and the person who had conveyed the legal estate to him, (that is, the *cestui que use*,) had neither *jus in re;* nor *ad rem;* for if he had entered upon the land without the consent of the feoffee, he had been a trespasser; so that nothing remained in him but a bare confidence or trust; for which, if it was broken, he had no remedy but by subpœna in Chancery.

But this equitable right extended itself to all persons who claimed in privity under the feoffee; that is, who came into the same estate which the feoffee had in the use, and by contract with *him;* for a *disseisor* came into the same estate, but not by contract or agreement; and therefore, claiming not *by* or *from* the *feoffee*, he consequently did not claim the estate as it was subject to the uses; but he claimed an estate above that free from and discharged of the uses, and it would in a manner have defeated his title, should he have been compelled to stand seised to a use, when he did not claim the estate which was charged with a use; for confidence in the person was requisite as well as privity of estate.

Confidence in the person was either express or implied; as, if a feoffee to a use had, for *good consideration*, enfeoffed one who had *no notice* of the use, the use was destroyed; for the person enfeoffed not knowing that there were any uses, no trust could be reposed in him to let the *cestui que use* take the profits; but if he had notice, a trust might well be said to be reposed in him, since he took the land, knowingly charged with the uses. So, also, if the feoffment had been made *without consideration*, though the person enfeoffed had *no notice* of the use, yet he would nevertheless have stood seised to the use; for the law in that case would have implied notice of the use, and consequently the trust would have remained.

Hence it may be collected, that to every use at common law there were two inseparable incidents,—a privity in estate, and a confidence in the person; and where either of these failed, the use was suspended or destroyed.

But for the better understanding of the law relative to this head, we shall consider,—

(A) The Origin and first Introduction of Uses.

(B) The several Properties of an Estate in Use at Common Law, which are,—

Uses and Trusts.

1. *That it is alienable; wherein, of the Power of* Cestui que Use.
   1. At Common Law.
   2. By the Statute of 1 R. 3, c. 1.
2. *That it is descendible; wherein,*
   1. Of the Descent of a Use in Possession.
   2. Of the Descent of a Use in Reversion.
3. *That it is devisable.*
4. *That it is not extendible, or Assets.*
5. *That it is not forfeitable.*
6. *That a Woman is not dowable of a Use.*

(C) The Inconveniences of Uses.

(D) The Alterations introduced with respect to Conveyances to Uses by the 27 H 8, c. 10.

(E) The several Sorts of Conveyances to Uses; wherein,

1. *Of those which raise Uses by Way of Transmutation of Possession; such as,*— 1. *Feoffment;* 2. *Fines;* 3. *Recoveries,* of which before, under their respective Titles. But herein farther,—

   Of Deeds declaring the Uses of Feoffments, Fines, and Recoveries wherein,

   1. Who may declare Uses.
   2. To whom they may be declared.
   3. In what Manner they may be declared.
   4. At what Time they may be declared.
   5. In what Cases Averments may be made of Uses.
2. *Of those Conveyances which raise Uses without Transmutation of Possession; such as,*—
   1. Covenants to stand seised to Uses; wherein,
      1. *Who may covenant to stand seised, and to whom.*
      2. *What Consideration is necessary to a Covenant to stand seised, and how far it extends.*
      3. *By what words a man may covenant to stand seised.*
      4. *The Effect of a Covenant to stand seised.*
3. *Of Bargain and Sale,* of which before under its proper Title.

(F) What Kind of Property may be conveyed by Way of Use.

(G) The several Kinds of Uses executed by the Statute; such as,

1. *Uses* in esse.
2. *Uses in Possibility; wherein,*
   1. Of executory Fees; and the Difference where they rise by way of Use, and where by Devise.
   2. Of contingent Remainders, *of which before under Title* "Remainder:" *But herein farther,*
      1. *In what Manner they are to be executed.*
      2. *How they may be defeated.*
         1. Where there is no power of Revocation.
         2. Where there is an express Power of Revocation.
      3. *How they may be suspended, revived, or extinguished.*

(H) The Cases out of the Statute; as,

1. *Where Uses are limited upon Uses.*
2. *Where Terms are raised and limited in Trust; wherein,*
   1. Of Terms which wait on the Inheritance.
   2. Of Terms in Gross.
3. *Where Lands are limited to Trustees to pay over the Rents and Profits.*

(B) Properties of an Estate in Use at Common Law.

(I) Resulting Uses, or Uses by Implication.

(K) Second or shifting Uses.

(L) The Manner of pleading Uses.

(A) The Origin and first Introduction of Uses.

THE original of uses was from a title under the civil law, which allows of an usufructuary possession, distinct from the substance of the thing itself; and it was brought over to us from thence by the clergy, who were masters of the civil law. For when they were prohibited from taking any thing in mortmain, after several evasions by purchasing lands of their own, tenants suffering recoveries, and purchasing lands round the church and making them churchyards by bull from the pope, at last this way was invented of conveying lands to others to their own use; and this being proper matter of equity, it met with a very favourable construction from the judge of the Chancery court, who was in those days commonly a clergyman; and the clergy thought this a statute contrary to natural justice, and so could easily tolerate any act for evading it. Thus this way of settlement began; and was often used for other fraudulent purposes, as to defeat just debts, wardships, escheats, &c.; but it more generally prevailed among all ranks and conditions of men, by reason of the civil commotions between the houses of Lancaster and York, to secrete the possessions, and to preserve them to their issue, notwithstanding attainders.(*a*)

Gilb. Law of Uses, 3. (*a*) Sir William Jones, 127, Lord Willoughby's case. ‖The analogy between the origin and progress of the *fidei commissio* of the Romans and of our uses is remarkable, and shows how "states and commonwealths have common accidents." Bacon says: "I find that in the civil law that which cometh nearest in name to the use is nothing like in matter, which is *usus fructus*; for *usus fructus* and *dominium* is with them as with their particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*; and therefore you shall find in Justinian, lib. 2, that they had a form in testaments to give inheritance to one to the use of another, *Hæredem constituo Caium, rogo autem te, Caie, ut hæreditatem restituas Seio*; and the text of the civilians saith, that for a great time if the heir did not as he was required, *cestui que use* had no remedy at all, until about the time of Augustus Cæsar, there grew in custom a flattering form of trust, for they penned it thus: *Rogo te per salutem Augusti*, or *per fortunam Augusti*, &c.; whereupon Augustus took the breach of trust to sound in derogation of himself, and made a rescript to the prætor to give remedy in such cases. Whereupon within the space of one hundred years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei commissarius*; and not long after, the inconvenience of them being found, they resorted unto a remedy much like unto this statute; for by two decrees of senate, called *Senatus Consultum Trebellianum et Pegasianum*, they made *cestui que use* to be heir in substance." Bacon on Stat. of Uses.‖ ℘Cruise, Dig. 388; 1 Madd. Ch. Pr. 446; Inst. 2, 32, 2; Code, 6, 42; Bouv. L. D. *Fidei commissum*. In Louisiana, fidei commissa were abolished by the code. 5 N. S. 302.℘

(B) The several Properties of an Estate in Use at Common Law.

UNDER this head it will be sufficient to observe in general, 1. That at common law a use is alienable; 2. that it is descendible; 3. that it is devisable; 4. that it is not extendible, or assets; 5. that it is not forfeitable; 6. that a woman is not dowable of a use.

1. That it is alienable; wherein, of the Power of *Cestui que Use*.

1. At Common Law. 2. By the Statute of 1 R. 3, c. 1.

(B) Properties of an Estate in Use at Common Law.

1. *At Common Law.*

It has been said in the definition of a use, that *cestui que use* had neither *jus in re*, nor *ad rem;* for, if the feoffee broke his trust, he had no remedy against him but by subpœna in Chancery.

This subpœna commenced in the time of E. 3, but it was always against the feoffee in trust himself, and was never allowed against his heir till H. 6, and in this point was the law changed by Fortescue, C. J. So that if the feoffee had died, his heir was seised to his own use, as the law was taken to the time of H. 4, till at length the subpœna was granted both against the heir, and the feoffee of the feoffee, about the time above mentioned, or, according to some, later.

Kelw. 42 b, 46 b.

But, though at common law *cestui que use* had no power over the land, yet might he alien the use, because every one may dispose of the rights that were in him; or he might prefer a bill in Chancery to make the terre-tenant execute the use in himself.

Gilb. Law of Uses, 26.

But, at common law, if *cestui que use* had entered and made a feoffment in fee of the lands, this had not been good to pass the estate to the feoffee; because *cestui que use* had not the freehold in him, and so could not pass it to another; but by his entry he was a disseisor: yet in this case, if the feoffees of *cestui que use* had re-entered upon the purchaser, the feoffees would not have had the lands to their own use; and they would not have stood seised to the use of *cestui que use*, because he had transferred the use to another.

Plow. 352 b. The feoffees upon their re-entry would, it seems, stand seised to the use of the last feoffee. See Plow. *loc. cit.* ‖In a similar case at this day the trustees would be compelled to convey to the feoffee of the *cestui que* trust. Gilbert by Sugden, 50.‖

If *cestui que use* make a lease for years, rendering rent, the reservation is void, unless it be by deed; for the rendering of rent to a man is an acknowledgment of the holding of lands from him; but here the lands are not held of *cestui que use*, but of the feoffees who have the reversion. But, if the reservation be by deed, the feoffees shall not have the rent reserved, but *cestui que use* shall have it.

Bro. *F. to Uses*, 338, § 23, 339, § 26. ‖These cases, and those opposite the next paragraph, arose after the statute 1 Ric. 3, c. 1.‖

If *cestui que use* make feoffment, with a letter of attorney to give *livery*, and the attorney give livery accordingly; *qu.* whether the feoffment was good, or whether it was not a disseisin?

Bro. *F. to Uses*, 339, § 28.

But by the statute of 1 R. 3, c. 1, a power was annexed to a use that *cestui que use* should alien the lands.

The reason of that statute was, because *cestui que use* in possession often aliened the lands, and then the feoffees entered, which caused a great deal of vexation and Chancery suits; and therefore the statute gave *cestui que use* an immediate power of alienation, without the concurrence of the feoffees; which leads us more particularly to examine the power of *cestui que use.*

Gilb. Law of Uses, 27.

(B) Properties of an Estate in Use at Common Law.

2. *By the Statute of* 1 R. 3, c. 1.

The statute of 1 R. 3, c. 1, enacts, that *every estate, feoffment, gift, release, grant, lease, and confirmation of lands, tenements, rents, services, or hereditaments, made or had, or hereafter to be made or had, by any person or persons, being of full age, of whole mind, at large, and not in duress, to any person or persons; and all* (a) *recoveries and executions* (b) *had or made, shall be good and effectual to him to whom it is so made, had, or given, and to all other to his use, against the seller, feoffor, donor, or grantor thereof, and against the sellers, feoffors, donors, or grantors, his or their heirs, claiming the same only as heir or heirs to the same sellers, feoffors, donors, or grantors,* (c) *and every of them, and against all others having or claiming any title or interest in the same,* (d) *only to the use of the same seller, feoffor, donor, or grantor, sellers, feoffors, donors, or grantors, or his or their said heirs, at the time of the bargain, sale, covenant, gift, or grant made:* (e) *saving to every person or persons such right, title, action, or interest, by reason of any gift in tail thereof made, as they ought to have had, if this act had not been made.*

(*a*) By this word (all) feint recoveries, as well as recoveries upon good title, are comprehended. But they are good only against the grantors, &c., and their heirs claiming only as heirs to such grantors, &c. So that they are not good against him that claims as heir to the grantor and his feme in tail *per formam doni*. Arg. Pl. C. 4 a, b, Mich. 6 Eliz. in Maxwell's case. (*b*) If a man recovers by erroneous judgment, and makes feoffment to his use, and the other brings writ of error, and reverses the judgment, he may enter without *scire facias* against the feoffees; for it is a recovery, and therefore it shall bind him and his heirs and feoffees by the statute 1 R. 3 Bro. *Feoffment to Uses*, 337, § 3. (*c*) Yet if *cestui que use* grants a rent-charge, and the feoffees are disseised, the grant shall be good against the disseisor; and yet he does not claim only by the *cestui que use*. Arg. 2 Le. 153, pl. 185, in case of Cordel's Executors v. Clifton. (*d*) This statute did not take away the power of feoffees, for they may yet make feoffments, but enlarged the power of *cestui que use*, who may now make feoffments likewise. Godb. 303, in case of Lord Sheffield v. Ratcliff. (*e*) It was agreed *per cur.* that these words are taken for tenant in tail in possession, and not tenant in tail in use; for *cestui que use* in tail has no right or interest. Bro. *Feoffment al Use*, 339 b, § 40. ‖Sir E. Sugden observes, several statutes were passed as well before this act as after it, and previous to the great statute, in order to remedy the abuses arising out of uses. By this act the conveyances of *cestui que use* were made binding against him and his heirs, and also against all persons claiming to his use. Although the act has now, it is apprehended, ceased to have any operation, it forms an essential part of a work on uses. Gilb. by Sugden, 52.‖

Here it is observable, that there is a difference between a feoffment according to this statute, and a feoffment at common law. In case of feoffments at the common law, the feoffor ought to be seised of the lands at the time of the feoffment; but, if a feoffment be according to the statute of 1 R. 3, in such case the feoffor did not need to be in possession. Feoffments at the common law give away both estates and rights; but feoffments by the statute of R. 3 give the estates, but not the rights. In case of feoffments at common law, the feoffee is in the *per*, viz., by the feoffor; but in case of feoffments by the statute of R. 3, the feoffees are in the *post*, viz., by the first feoffees.

Godb. 318, Ld. Sheffield's case; 2 Roll. R. 334, S. C.

Another difference likewise is taken in Plowden between the feoffment of the feoffees and of *cestui que use;* for if the *cestui que use* for life or in tail made a feoffment in fee, either with or without consideration, all the old uses were discontinued, and the ancient estate which the feoffees had is gone, and a new estate created, subject to those new uses raised by the

feoffment; for when *cestui que use* makes a feoffment in fee, which by this statute he might lawfully do, he passeth an use in fee-simple to the feoffee, which being a new use to the feoffee, all the old uses are discontinued, and, consequently, the estate of the feoffee must be altered: for, were it the ancient estate, it were still subject, by the former and elder limitation of uses, to the old uses; therefore have the feoffees, by construction, a new estate to the new uses. But, if the feoffees themselves had made a feoffment without consideration, the feoffees had stood seised to the old uses, for here was no use nor new estate.

Gilb. Law of Uses, 180, cites Pl. C. 350.

By the statute, *cestui que use* has no power of alienation, when he has a naked right to a *use*, and not a use in *esse*, unless it be in order to confirm an estate in being; because the intent of the statute was only to give *cestui que use* a greater power to transfer his estate, and not any other remedy to regain and revest it; and unless he has the *use*, he cannot pass the *use*, much less the possession, to another.

Gilb. Law of Uses, 27; Plow. 351.

But, if the feoffee to a use in fee be disseised, and *cestui que use* release to the disseisor, this extinguishes the use, and, by the statute, bars the entry of the feoffee.

Plow. 351. For by the words of the act, the release is good against all claiming any title or interest to the use of releasor. Ibid. Ibid.

Also, where feoffees to a use are disseisees, and after the disseisor enfeoffs *cestui que use*, who enfeoffs a stranger; this is good, and shall bind the feoffees; for the feoffment is good to pass the possession, and right of the use, which he had in him: and the feoffees cannot enter to revive a use, which the party himself by his own act has extinguished.

Gilb. Law of Uses, 28.

The statute likewise is to be understood of *cestui que use* that has a *use in esse*, in opposition to him that has only a reversion or remainder of a use.

If a feoffment be made to the use of A for life, remainder to B in fee, A may alien in fee, because the feoffees claim the whole estate for the use of A during his life, and he has the whole advantage of it; and the statute that gives the present possessor of the use a power of alienation, has provided an immediate remedy for the remainder-man.

Gilb. Law of Uses, 28; Plow. 330.

But, if the tenant for life of a use aliens in fee, and dies, the feoffees may enter on the alienee; for, by the words of the statute, the alienation is good against *cestui que use* and his heirs, and persons claiming only to his use. So, when feoffees claim to the use of the remainder-man, the feoffment of tenant for life, according to the authority given by the statute, is no longer valid to bar the feoffees of the entry; for their right is by the common law.

Gilb. Law of Uses, 29; Plowd. 348, Delamere and Barrard's case, the point resolved.

If there be a feoffment in fee to the use of A for life, the remainder to B in fee, B has no power of alienation by the statute, during the continuance of the estate for life, because the possession is, as is said, to the use of A only, during his life, and so the remainder-man has nothing to do with the possession: and if the remainder-man should enter on the feoffees and make a feoffment, either the use of tenant for life would be destroyed, or the

feoffees must re-enter and create a particular estate to themselves, without being subject to dower;(*a*) for by the common law, every particular estate is derived out of the fee-simple by the agreement of the parties in interest; but here are no parties to such agreement, and the statute has not altered the law in this case.

Gilb. Law of Uses, 29; Plow. 350; 1 Co. 128 b. But, though B cannot make a feoffment during the continuance of the estate for life, yet, it seems, he may sell his remainder during the life of A. Bro. *Feoff. to Uses*, 339 b, 44. ‖(*a*) *Qu.* a "donor."‖

But if there be a feoffment for life, remainder in fee, he in remainder may make a lease for years, or grant a rent-charge to begin after the death of tenant for life; for he cannot enter and take the possession out of the feoffee; but it is an executory contract on which the statute operates after the death of tenant for life.

Gilb. Law of Uses, 30; Plow. 350 b.

So likewise, if a lease for life is made to the use of A, and afterwards the reversion is granted to another for life to the use of B, and attornment is had, and afterwards the reversion is granted to another in fee to use of C in fee, and attornment is had; in this case A may give the first estate for life to whomsoever he pleases, and B may grant the reversion for life to whomsoever he pleases, and C may grant the reversion in fee to whomsoever he pleases.

Plow. 350. The reason is, that here the estates are several, and the uses go out of the several estates, whereas in the case of a feoffment to the use of one for life, &c., all the several uses issue out of one estate, viz., out of the fee-simple, which is one same estate without division, and the several possessors of the several uses cannot sever the estate which is entire. Plow. *loc. cit.*

Where a feme covert was *cestui que use*, and she and her baron made feoffment; this was good but during the life of the baron only by equity and reason, though the statute of 1 R. 3 says nothing of a feme covert.

Plow. 350.

It is to be observed farther, with regard to the power given over estates in use, that if *cestui que use* makes a feoffment in fee upon condition, and after enters for the condition broken, he shall be seised of the estate in the land; for the whole estate is divested out of the feoffee by the feoffment, and they cannot enter for the condition broken, because no parties to it.

Gilb. Law of Uses, 32; 1 Inst. 202 a. But, if husband seised in right of his wife make such feoffment, and re-enter for the condition broken, there he shall be seised in right of his wife, as before. Bro. *Feoff. to Uses*, 338 b, § 23.

But, if *cestui que use* in tail aliens the land by lease and release, or feoffment; this only binds the feoffees during his life, because he has no longer power of alienation. If the *cestui que use*, however, aliens by fine, this is good, and bars the entry of the feoffees after his death, for that would dispossess the estate in tail by the statute of 4 H. 7. Yet if he aliens by recovery, it does not bind the *issue*, because he is not *tenant to the præcipe;* so that would be no bar at common law: and this is not helped by any statute: for though a recovery here be expressly mentioned, and so it bind the party himself, yet the right of the estate in tail is saved.(*b*)

Bro. *Feoff. to Uses*, 337, § 2, 338, § 22, ‖340 a, § 56.‖ (*b*)Ibid. § 7; Gilb. Law of Uses, 32. ‖The references to Broke show how the law fluctuated on this head. It appears, however, to have been at last settled, that the recovery of *cestui que use* was binding on his issue.‖

If tenant in tail of a trust levy a fine, or suffer a recovery, this is an

equitable bar of the estate, though the trustees do not join in the recovery to make a legal tenant to the *præcipe:* for as the fine and recovery pass the entail in a legal estate at common law, so they pass the entail of a trust in the court of equity.(*a*)

1 Ch. Cas. 49, 213; 2 Ch. Cas. 63, 64. ‖(*a*)The author is here speaking of a trust since the statute of uses. It is now settled, that a fine or recovery by an equitable tenant in tail has precisely the same operation as a fine or recovery by a legal tenant in tail, but no greater. 1 Ch. Cas. 213; 1 Vern. 440; 2 Vern. 131, 344; and a fine or recovery is essential to bar an equitable entail. 1 P. Will. 87; 3 Atk. 815; and see Gilbert by Sugden, 58.‖

But, if tenant in tail of a trust makes a mortgage, or acknowledges a judgment or statute, and then levies a fine and settles a jointure, the jointress shall hold it subject to the mortgage or judgment in the same manner as if the mortgagor or conusor had been tenant in tail of the legal estate, and after the mortgage or judgment had levied a fine and made a jointure; because the subsequent declaration of the use of the fine is merely the act of tenant in tail, and he cannot by any act of his own make a subsequent conveyance take place of one precedent; and the rather, because the feme claims under that fee which tenant in tail got by the recovery or fine; and that fee was subject to all the charges he had laid upon it.

1 Ch. Cas. 119, 120.

If *cestui que use* makes a lease for years, reserving a rent, he shall have an action upon the contract; but he shall not *avow*, because the legal estate of the reversion is still in the feoffees, since he has put the estate out of them but for a term; but the equitable estate is in him, and he may dispose of it, and the rent passes; but the feoffees shall punish for *waste* done by the tenant, and enter for a forfeiture, &c.

Bro. *Feoff. to Uses*, 337, § 6, 338, § 18.

Also, if *cestui que use* makes a lease for years, reserving a rent, this shall go to his heirs; for since the statute has given him power to make estates at law, they are governed by the rules of common law.

Bro. *F. al Uses*, 338 b, § 18, 23, 39; Gilb. Law of Uses, 34.

So, likewise, if *cestui que use* makes a lease for years, reserving a rent with a clause of re-entry for non-payment of the rent, and the rent is behind, *cestui que use* may enter; for he only can take advantage of his own condition. And since the statute allows the act of re-entry by allowing him power to make leases, he shall for ever keep the possession against the feoffees. *Quære tamen.*

Bro. *F. to Uses*, 338, § 18; Gilb. Law of Uses, 34. ‖It seems clear, that the above statute of Richard the Third does not apply to *cestui que trusts* of terms, but only to seisins in fee; a question of importance; since, if the statute did so apply, the assignment of *cestui que trust* of a term would at this day pass the legal interest. See Sir E. Sugden's note on the subject, Gilb. Law of Uses, 66, and 1 Sanders on Uses, 32. Goodtitle v. Jones, 7 Term R. 47; Blake v. Foster, 8 Term R. 494. Sir E. Sugden and Mr. Sanders agree, that there is now no case to which the statute of 1 Ric. 3, c. 1, is applicable.‖

A gift of land for years, or of a lease for years, to a use, is good, notwithstanding the statute of R. 3. For the statute is intended to avoid gifts in chattels to uses, to defraud creditors only; and so is the preamble and intent of this statute.

Bro. *Feoff. to Uses*, 340, § 60.

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But the statute does not give *cestui que use* any power to devise the land.

Gilb. Law of Uses, 32.

The next property is,

2. *That it is descendible; wherein,*

With respect to the descent of uses, we must consider,

1. Of the Descent of a Use in Possession.
2. Of the Descent of a Use in Reversion.

Concerning the first, it is a principle, that if a use be limited to a man and his heirs, the Court of Chancery will direct it to go to such persons as the common law has appointed to represent him, for the Chancery cannot alter the common import of words, or set up rules of property opposite to the rules of law.

Gilb. Law of Uses, 16.

As the Court of Chancery cannot alter the descent of the land, so it cannot alter the law and custom of a place; for all immemorial usages are part of the laws of the land: and so if a man makes a feoffment in fee of lands in gavelkind or Borough-English, without a consideration, to the use of the feoffor and his heirs, this shall go to all the sons, or to the youngest, according to the custom.

1 Rep. 101, Shelley's case; Dy. 179; 2 Roll. Ab. 780; 1 Inst. 23; 13 Rep. 56, Samme's case. See Hob. 31, Counden v. Clerke; Bro. *Feoff. to Uses*, 339, § 32.

So also, if there is a custom, that lands shall go to the eldest daughter only, where there is no son, and a trust in equity descends upon the heir, it shall go to the eldest daughter only.

2 Roll. Ab. 780; 10 Car. Jones v. Reasby. It was in the same term decreed in Chancery accordingly. Ibid.

As the Chancery is governed by rules of inheritance, therefore none can make himself heir but he that represents the person that was last in possession; for he that last possessed it had the entire dominion and property, which none else can have but by standing in his place; and no man can stand in his place but one of the whole blood.

1 Inst. 14; 4 Rep. 22, Copyhold Cases.

Thus, if lands descend on the part of the mother, and the party makes a feoffment in fee, without consideration, or reserving this use to him and his heirs, the use shall descend to the heirs of the part of the mother; for the land would have gone to the heirs of the part of the mother, and a use is but an estate in equity, part of the estate in the land; for the rule of law that tends to the establishment of families and encouragement of industry, is, that those that take benefit as representatives shall convey it all along in the blood of the first purchaser, from whom the benefit was derived; and the use and possession was derived from the mother, and the use was never parted with, but the possession only; so the use must be all along conveyed to the heirs on that side.

1 Inst. 13 a; 2 Ro. Ab. 780; 13 Rep. 56, Samme's case; Bro. *Feoff. to Uses*, 338 a, § 10. But see Hob. 31, Counden v. Clerke, and Dy. 134.

It is to be observed, likewise, that there is a *possessio fratris* of a use, which follows the analogy of descents at law; and so if a man seised in fee of a use had issue a son and a daughter by one venter, and a son by another venter, and devises it for years, and dies, and the son dies during

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the term, the daughter shall have it, and not the son: otherwise it had been, if he had devised it for life.

Gilb. Law of Uses, 18; 1 Rep. 121, Chudleigh's case. ‖See Bac. on Uses, p. 11; 1 Black. Com. 137.‖

Also, if a man for a valuable consideration purchases lands, or the use of them to himself, they shall descend to his heirs: for there wants not the word heirs to create an inheritance in a use: for it is equity, that a person who gave a consideration for the fee should have it; and that is not setting up any other rules of property opposite to the rules of law, but mitigating and dispensing with the rules of law, in particular cases, where they should happen to shelter dishonesty and oppression; but now, since the statute, no inheritance can be raised without the word heirs, because now the uses, as will be shown, are transferred into possession, and must be governed by the rules of possession at common law, as to the words that create new estates.(*a*)

Bro. *Feoff. to Uses*, 337 b, 4; 1 Rep. 100 b, Shelley's case; Gilb. Law of Uses, 17, 18. ‖(*a*) But yet, as before the statute, if A agree to sell a fee-simple estate to B, the purchaser, immediately after the contract, is seised of the fee in view of equity, although no words of inheritance were inserted. Gilb. on Uses, by Sugden, 30.‖

2. Of the Descent of a Use in Reversion.

In regard to descents of this kind, they are governed by the following rules:

Where a man has an estate in himself, and limits an estate to his right heirs, he is seised of the whole estate.

In the same manner, where a man has a use in himself, and limits a use to his own right heirs, the same use is in him still. The reason is, because ancestor and heir are correlative; and so whoever represents me as to my estate vested in him after my death, I represent him during my life as to that estate; and, consequently, giving an estate, already in me, to my heir, is not departing with it, for it is a disposition, in other words, to myself, and so all things remain *in statu quo*.

1 Vent. 380; Pibus v. Mitford, Gilb. Law of Uses, 19; ‖Co. Lit. 22 b; 15 Ves. J. 365.‖

Thus, if a man seised of lands in fee, makes a gift in tail, or a lease for life, remainder to his own right heirs, they take by descent, as in the old reversion.

1 Inst. 22 b; Gilb. Law of Uses, 20. ‖This rule applies equally to a *devise* by a man to his own right heirs, though termed a remainder, and it will require a clear and manifest intention to make the words operate as words of purchase. 11 East, 548; 12 East, 589; Gilb. on Uses, by Sugden, 32.‖

Also, if A, seised of lands in fee, grants them by fine during his own life, the remainder to his own right heirs, the reversion is in him, and he may grant it.

Gilb. Law of Uses, 20. ‖See edit. by Sugden, 33, n. 6.

So likewise, in the case of a fine *sur conuzance de droit que il et sa feme ad de son done* to the husband, with a remainder to the conusor for life, remainder to the right heirs of the husband, they are in of the old reversion, and the wife surviving shall have it for life.

Gilb. Law of Uses, 20; Dy. 237.

Also, if a man makes a feoffment without a valuable consideration, to the use of himself, for forty years, the remainder to B in tail, the remainder

to his own right heirs; the feoffor is in of the old reversion, and he may devise it, for a feoffment without consideration does not dispose of the use thereof; the old use is in him still.

E. of Bedford's case, Poph. 3; 1 Moor, 718, 719, S. C.; 1 Rep. 130, Chudleigh's case.

But it hath been held, that if the feoffment were made upon a valuable consideration, inasmuch as that it is a disposition of the use, there is an estate in the feoffees to retain it till the death of the feoffors; and this is an estate of freehold, and affords a tenant to the *præcipe*, and an estate to support a contingent remainder.

1 Inst. 22 b, 23 a; Gilb. Law of Uses, 21.

Also, where I limit a use, already in me, to my own representatives, and add a qualification to those representatives; though this be no departing with the estate, because there are not words to convey it out of myself, yet there is an alteration of the estate in myself; and the use shall alter and descend to my heirs that came under that particular distinction and qualification; because the use has always been changed and modified according to the intent of the parties who have the interest; and such a particular estate shall be supposed in them, as may best answer the intent, *ut res valeat.*

Gilb. Law of Uses, 20.

It is to be observed, likewise, with respect to *remainders*, that where a man limits an estate of freehold to me for life, with a remainder to my heirs, though after ever so many particular estates, the remainder is vested in me for three reasons. First, because otherwise you construe the grant most in favour of the grantor, and let him into the reversion during the contingency, to punish waste and enter for the forfeiture. Secondly, because the whole advantage must be intended to me when I am first named to take the same sort of estate in the conveyance, and the benefit is not designed to any other particular conveyance, but to all other persons that bear the character of my representatives; so that the limitation is for my sake, and only intends to enlarge my estate after the particular estates are worn off, yet cannot be construed in the same manner as where an estate is limited to A, the remainder to the right heirs of B, because there is nothing in the last case to lead the mind to such an interpretation; for there is no benefit originally designed to B, but to his heirs primarily; and so the heir takes as a purchaser. But, if the same sort of estate be not limited to the ancestor as to the heir, the heir must take by purchase; for it is plain the donor designed him an original benefit, quite different from what he designed the ancestor. Thirdly, because when the particular estates are worn off, they are as if they had never been; and so the heir should claim by descent, as in his better title, and as of the dying seised of his ancestors. Another reason of this law is, because it must be a contingent remainder, or a remainder vested; but it would not be a contingent remainder, because of necessity it must be in the ancestor and the person that represents him, and so construed a remainder vested. Thus,—

1 Vent. 372 to 382; Gilb. Law of Uses, 21.

If J S makes a feoffment to the use of A, the remainder to B, the remainder to the right heirs of A, the remainder is vested in A, and his heirs claim by descent.

Gilb. Law of Uses, 23; Cro. Car. 24 a.

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But if J S makes a feoffment to the use of A for a term of years, the remainder to B T, the remainder to the right heirs of A; the remainder is not vested in A, but his right heirs take by purchase.(*a*)

Moor. 720, Earl of Bedford's case; Gilb. Law of Uses, 23. ‖(*a*) Because A takes a chattel interest only, and not a freehold.‖

If an estate be limited to A for life, remainder to the heirs male of the body of A, and to the heirs male of such heir male, there is a trust executed in A, because this is within the rule; for here an estate is limited to A for life, with a remainder to his heirs; and so the word heirs is not a name of purchase, but of limitation.

1 Inst. 22 b; 2 Rep. 91 b, cites Fenwick v. Mitford. ‖See Sir E. Sugden's learned note on this passage, Gilb. Law of Uses, 39.‖

But if an estate be devised, or, *per* Hale, be conveyed to A for life, the remainder to his next heir male, and to the heirs male of the body of such heir male; there is an estate only for life in A, and a contingent remainder in his heir, as a purchaser, which vests *eo instante* that the particular estate determines; for though there be an estate for life in A, yet the remainder is limited to his heir only, in the singular number only; and heir in the singular number only is a word of purchase, and not of limitation.

1 Rep. 66, 67, Archer's case; Gilb. Law of Uses, 24; 1 Inst. 22 b. ‖The decision depended principally on the superadded words of limitation.‖

Likewise, if an estate be limited to a man *and* his heir, he has only an estate for life; for it cannot go in perpetual possession, because no more representatives than one only is expressed. The heir cannot take by way of remainder, because it is limited by a conjunction copulative; and a joint-tenant he cannot be, because *nemo est hæres viventis*.

Gilb. Law of Uses, 24; 1 Inst. 8 b.

But if one *devises* an estate to a man and his heir, a fee-simple passes, and heir there is taken as *nomen collectivum*, to answer the intent of the party, which appears to be, that he intended to pass a fee, as if it had been limited to the devisee and his heirs for ever.

Gilb. Law of Uses, 24; 1 Inst. 8 b.

‖Where there was a devise to a woman and her heirs during their lives, and she had two children born before, and a third born after making the will, it was held, that the latter words were repugnant to the others, and that she took an estate of inheritance.

Doe dem. Cotton v. Stenlake, 12 East, R. 515.‖

So, if an estate be devised to A during the life of B, in trust for B, and after the decease of B to the heirs male of the body of him the said B now living, that is a remainder vested in the heirs of B; for heir now living, in that devise, must be taken as a periphrasis of the heir apparent, who is called heir in law, as may be observed by the words *quare filium et hæredem rapuit*.

Gilb. Law of Uses, 24; 2 Vent. 311, Burchett v. Durdant. ‖See Sir E. Sugden's note, Gilb. Law of Uses, 47.‖

The next property of a use is,

3. *That it is devisable.*

The reason why lands were not originally devisable, was, because the ceremony of *livery* was required to the transmutation of the possession, which is not necessary to the disposal of a use; for livery is to give notice

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against whom the *præcipe* is to be brought, and the *præcipe* is only of an estate of freehold.

Treatise of Tenures, 77; 1 Rep. 123 b; Gilb. Law of Uses, 35. But by 32 H. 8, c. 1, and 34 H. 8, c. 5, lands, &c., are devisable by will.

If a man makes a feoffment in fee to the use of his last will, the feoffor has it to the use of himself and his heirs; for until a man has actually disposed of the use, the use is in him only; and if he devises, the parties must claim their interest by the devise.

6 Rep. 18; Sir Edw. Clere's case; 1 Inst. 111 b; Bulst. 200, Semain's case.

But if a man makes a feoffment in fee to the use of such person and persons, and of such estate and estates as he shall appoint by his last will; there, by the words of the conveyance he has a *qualified fee*, till declaration and limitation according to his power reserved; and it is only the office of the will to nominate; for the interest is transferred and disposed of by the feoffment. But, where there are no words of disposition, &c., in the feoffment, there the parties must claim by the devise.

6 Rep. 18, Sir Edward Clere's case; 1 Inst. 111 b; Gilb. Law of Uses, 33. ‖This is a case since the statute of uses. The fee results, and is vested, subject to be divested by an appointment. In what cases a disposition shall take effect under the power or by force of the interest, see Sug. Treat. of Powers, p. 231.‖

If a copyholder surrenders to the use of his last will, the land is still in the copyholder, and he may dispose of it by an act in his lifetime; if he does not by any will, it shall go to his heirs; if he makes a will, it passes by the surrender, and not by the will; for the property of the copyhold is not altered by a private act of the tenant, but by an open and solemn act in the lord's court.(*a*) But at common law, the use of the land may pass by a devise, as is said; and the freehold itself since the statute ‖of wills.‖

4 Rep. 23, Copyhold cases; 1 Leon. 174, Bulleyn and Grant's case; Cro. Eliz. 441, Fitch v. Hockley. ‖(*a*) This has no relation to the subject before us. Copyholds are not within the statute of uses, because the transmutation of possession by the sole operation of the statute, without allowance of the lord, would tend to the lord's prejudice. Rowden v. Malster, Cro. Car. 44; and see 5 Term R. 111.‖

Also, if a man suffers a recovery to the use of his last will, he may dispose of the estate by a *conveyance de novo* during his life; but he cannot during his life limit new *uses* on the *old recovery*, so as to be thereby bound from any alteration: because the whole interest of the recovery was declared to be to the *use* of his *will;* which is changeable in its nature.

Hob. 349, Earl of Ormond's case; Gilb. Law of Uses, 36.

Likewise, if a man makes a feoffment in fee to the use of his last will, and in the deed he expresses the *use* of the will to be to himself for life, and then to his son in tail, and afterwards makes a lease for years, and dies, this shall bind the son; for it being expressly declared to the use of his will, it supposes a power in him to change it.

Bro. *F. al Uses*, 337, § 1; 19 H. 8, c. 12. But where the use is declared upon the livery without the word "will," there, he cannot alter his will. Bro. *loc. cit.*

If *cestui que use* devises, that his feoffees may alien the land to J S, the feoffees may enfeoff A, and B may alien to J S.

Bro. *F.* 338, § 12.

Likewise if *cestui que use* devises, that his feoffees should alien the land for payment of his debts, the creditors may compel him in the Court of Chancery to do it.

Bro. *F.* 338, § 12.

So also, if *cestui que use* devises that his feoffees should alien the land, the heir shall take the profits till alienation, and if they do not alien, he shall have the land for ever.

Bro. *F.* 338, § 12. ‖See a translation of this case from the Year-Books, Sug. on Pow. App. No. 1, p. 535.‖

4. That it is not extendible, or Assets.

The reason why a use was not extendible is, because there is no process at law but upon estates at law; and uses are merely creatures of equity, on which the common law can award no execution; and they were not *assets*, because they go in the course of inheritance, and not to executors.

1 Rep. 121 b, Chudleigh's case; 1 Ch. Cases, 14, Bennet v. Box; Ibid. 128, Pratt v. Colt.

But if a term be limited to attend a fee-simple, this shall be assets for the payment of just debts; for the Court of Chancery will not carry it out of its due course, where there is any prejudice or inconvenience.

Hardr. 489, The Attorney-General v. Sir Geo. Sands. ‖The term shall be equally charged with the inheritance, but not to a greater extent; therefore it shall not be personal assets for payment of debts. Thruxton v. Attorney-General, 1 Vern. 340; Tiffin v. Tiffin, 1 Vern. 1. The rule is the same, though the term is attendant only by construction of equity. Baden v. Earl of Pembroke, 2 Vern. 52, 213.‖

Likewise by the stat. of R. 3, it is held extendible upon a statute staple, or merchant; for this is in the nature of a grant, or lease for years; and grants of leases are made good against *cestui que use* and the *feoffees*, by the statute.

Bro. *F. al Uses*, 339, § 25; 1 Co. 131 b, Chudleigh's case.

But since the statute of frauds and perjuries, uses seem to be assets in the heir for the payment of just debts, the heir being obliged to pay all just debts out of a real estate that descends from the ancestor.

1 Chan. R. 128, Pratt v. Colt; Gilb. Law of Uses, 38. ‖But it is questionable whether execution can be sued after the trustee, in whom the estate was vested, has conveyed it to a purchaser. See Gilb. Law of Uses, by Sug. 77.‖

5. That it is not forfeitable.

A use in fee could not be forfeited for felony; for in case of felony the lands are cast on the lord of whom they are holden, for want of heirs; but a use is holden of nobody.

Hardr. 466, 467, 488, 489; Gilb. Law of Uses, 38.

Neither could it be forfeited for treason; for all tenures are forfeited by the breach of fidelity and duty owed to the lord; for under that condition the tenants take their estates, and consequently all breaches of allegiance forfeit the estate to the king, since it originally came from, and is still holden of him; but a use is holden of nobody.

Hardr. 492, 495; Gilb. Law of Uses, 39. But the law in this point is altered by 26 H. 8, c. 13; 33 H. 8, c. 20. And see Hale's P. C. vol. i. 240, 247, *et sequent.* ‖In Burgess v. Wheate, 1 Blackst. 123, it was decided by Lord Keeper Henley, and Sir Thomas Clarke, against Lord Mansfield, that upon the death of *cestui que trust* without heir the estate does not escheat, but shall be retained by the feoffee.‖

But, if a term be limited in trust, and *cestui que trust* commit treason or felony, the term is forfeited; for the personal property goes with the persons; and when the possession is forfeited, the party is incapable of per-

sonal property, consequently, the right is in the public, and the king has the use of the term in this case.

Allen, 16, Holland's case; Hardr. 366, 495; Gilb. Law of Uses, 39.

Yet, if a term be limited to attend the inheritance in trust, it is not forfeited for felony, because it does not vest in his person and go to his executors, but belongs to the inheritance, like the charters which are not forfeited.

Hardr. 495, Attorney-General v. Sands; Gilb. Law of Uses, 39.

But no use can be forfeited at this day, unless it be of a chattel or a lease; for all uses of frank-tenement are, by the statute of 27 H. 8, executed in possession, as will be shown hereafter; and so there is no use which can be forfeited, and it would be in vain to give uses where no use exists at the time.

And. 294, pl. 302, Sir Francis Inglefield's case.

6. *A Woman is not dowable of a Use.*

A feme was not dowable of a use, for the privilege of dower was only to freeholders' wives; now a use, being no freehold, was not within that law, and the Chancery allows the feoffees to be seised to nobody's use but those that are particularly named in the trust.(*a*)

1 Rep. 122 a; Gilb. Law of Uses, 25. Neither can a husband be tenant by the curtesy of a use. 1 Rep. 122. ‖(*a*) This rule still prevails as to trusts, of which the wife is not dowable. 2 P. Will. 708; Forr. 138; Sug. Ven. & P. 605, (3d edit.;) 2 Atk. 525; 1 Black. 123. But it is firmly settled that a husband shall have curtesy of a trust. 1 P. Will. 108: and even of money directed to be laid out in land, because in equity it is considered as laid out. 2 Vern. 536; 1 Ves. 174. The rule as to the exclusion of dower appears to have arisen from the common practice among conveyancers to place the legal estate in trustees, to prevent dower; and, therefore to let in dower would have created confusion. 3 P. Will. 234; and see Gilb. Law of Uses by Sug. 49.‖

And that being the case, it became a practice for the father and friends of the woman to procure the husband to take an estate from the feoffees, or others seised to his own use, for life; and then to the use of his wife, for life, before or after the marriage; which was the original jointures.

4 Rep. 1 b, Vernon's case. After the 27 H. 8, for transferring uses into possession, the wives would have been entitled to their dower of the husband's seisin, as well as to their jointure, which occasioned the adding of the branch concerning jointures to the 27 H. 8. See title *Dower and Jointure*, Vol. iii.; ‖and see note, 4 Co. 1 b, edit. Thomas and Fraser; Co. Lit. 36 b, 37 a; 1 Cru. Dig. tit. 7, c. 1, § 27.‖

(C) The Inconveniences of Uses.

Such was the nature, property, and operation of uses at common law, and since the statute of R. 3. And though these uses had a very equitable beginning, yet, like all new models of general schemes of ordering property, they introduced a great many unforeseen inconveniences, and subverted in many instances the institution and policy of the common law. For—

Estates passed by way of use, from one to another, by bare words only, without any solemn ceremony or permanent record of the transaction; whereby a third person that had right knew not against whom to bring action.

See the preamble to stat. 27 H. 8, c. 10; 1 Rep. 123, 124; 1 And. 323; Poph. 73.

Uses likewise passing by will, the heirs were disinherited by the inad-

(D) Alterations introduced by 27 Hen. 8, c. 10.

vertent words of dying persons. Lords also lost their wardships, reliefs, marriages, and escheats; the trustees letting *cestui que use* continue the possession, whereby the real tenants that held the lands could not be discovered. The king likewise lost the estates of aliens and criminals; for they made their friends trustees, who kept possession, and secretly gave them the profits so as the use was undiscovered. Purchasers were insecure; for the alienation of *cestui que use* in possession was at common law a *disseisin*, and though the 1 R. 3, c. 1, gave him power to alien what he had, yet the feoffees might still enter to revest a remainder or contingent use, which were never published by any record or livery, whereby the purchaser could know of them. Estates likewise created by law in consideration of marriage, such as tenancies in dower and by curtesy, were defeated, notwithstanding the 1 R. 3. Add to these, that the use was not subject to the payment of debts, and that many lost their rights by perjury, in averment of secret uses. And lastly, that *uses* might be allowed in mortmain.

Gilb. Law of Uses, 72.

To remedy these inconveniences, the legislature framed the statute of 27 H. 8, c. 10, which leads us to consider,

(D) The Alterations introduced with respect to the Conveyances to Uses by the 27 H. 8, c. 10, which

Enacts that, *Where any person or persons* (a) *stand or be seised*,(b) *or at any time hereafter shall happen to be seised of or in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments*,(c) *to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise by any manner of means whatsoever it be; in every such case, all and every such person and persons, that have or shall have any such use or trust in fee-simple, tail, for life, or years, or otherwise, or any use, confidence, or trust in remainder or reverter*, (d) *shall from henceforth stand and be seised and be deemed and judged in lawful seisin, estate and possession* (e) *of and in the same honours, &c., to all intents, &c., of and in such like estate as they had or shall have in the use, &c., of and in the same; and the estate, title, right, and possession of such person or persons, as were or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have any such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them.*

(*a*) 27 H. 8, c. 10. The word "person" excludes all corporations. Lord Bacon's Reading on the Statute of Uses, 334, 335; ‖Gilb. Law of Uses, 7, and Sir E. Sugden's note.‖ (*b*) This word "seised," excludes chattels and rights. ‖See Gilb. on Uses, by Sugden, 78, 79; and see 1 Comyn, 270.‖ It likewise excludes contingent uses, because the seisin cannot be but to a fee-simple of a use; and when that is limited, the seisin of the feoffee is spent. Lord Bacon's Reading on the Statutes of Uses, 335. (*c*) This word "hereditaments," is to be understood of those things whereof an inheritance is *in esse*; for if I grant a rent-charge *de novo* for life to a use, this is good enough; yet there is no inheritance in being of this rent. It likewise excludes annuities and uses themselves; so that a use cannot be to a use. Lord Bacon's Reading on the Statute of Uses, 335. (*d*) The statute having spoken before of uses in fee-simple,

(D) Alterations introduced by 27 Hen. 8, c. 10.

in tail, for life or years, addeth, or otherwise "in remainder or reverter," whereby it is manifest that the first words are to be understood of uses in possession. Lord Bacon's Reading on the Statute of Uses, 337. (*e*) The words "lawful seisin, state, and possession," intended not a possession in law only, but a seisin in tail; not a title to enter into the land, but an actual estate. Lord Bacon's Reading on the Statute of Uses, 338.

§ 2. *Where divers persons shall be jointly seised to the use or trust of any of them, those which shall have such use or trust shall be adjudged to have only such estate, possession, and seisin of the lands, &c., as they had in the use or trust, saving to all persons other than those which be seised to any use or trust, all right, &c.*

§ 3. *Also saving to all those persons which shall be seised to any use, all such former rights as they might have had to their own proper use.*

Upon this saving clause the following case has been determined. The husband being seised in fee made a lease to O and S, but it was in secret confidence for the preferment of his wife; and afterwards he made a feoffment to O and others of the same land to other uses. It was decreed by the advice of Wray, Anderson, and Manwood, that the term was not extinguished by this feoffment, by reason of the proviso; and because O had this lease to his own use, it is not extinguished by the feoffment which he took to the use of another. Mo. 196, pl. 345, Cheyney's case; 2 And. 192, pl. 9, S. C. says, the lease was made really in trust to the use of the wife, and education of their sons and daughters, notwithstanding that divers covenants were therein contained, and a rent was reserved; and says, that the feoffment made afterwards was to the use of the husband himself and his said wife for their lives, with remainder over; and that the same was held accordingly.

§ 4, 5. *Where any be seised to any use or intent that another shall have a yearly rent out of the same lands,* cestui que use *of the rent shall be deemed in the possession thereof of like estate as he or she had that use.*

A man, in consideration of natural love and affection, covenanted to stand seised to the use of himself for life, the remainder to B his son in tail, and to the intent that B should have a rent issuing out of the lands, during the life of A; B the son dies, and his executors brought debt for the arrears of the rent. It was resolved and adjudged, that by these words of the statute B in this case had a good rent, as well upon covenant as by a feoffment, or bargain and sale. Sir W. Jo. 179, Rivetts v. Godson.

The design of this law was utterly to abolish and destroy that pernicious way of conveyance to uses.(*a*) And the means they took to do it was to make the possession fall in with the use in the same manner as the use was limited; and where they were all freeholds, it was thought they would be then subject to the rules of common law. But the method has not answered the legislature's intent; for it has introduced several sorts of conveyances quite opposite to the rules of common law; for now, whereever a *use* is raised, the statute gives *cestui que use* the possession; so that it is only necessary to form a *use*, and the possession passes, without any livery or record, and the reversions, without the attornment of particular tenants; and now the use (by the name of trust, which were one and the same before the statute) remains separately in some persons, and the possession separately in others, as it did before the statute, and are not brought together but by decree in Chancery, or the voluntary conveyance of the possessor of the land to *cestui que trust*. So that the principal use of the stat. of 27 H. 8, especially upon fines levied to uses, is not to bring together a possession and use, but to introduce a general form of conveyance, by which the conusors of the fine, who are as donors in the case, may execute their intents and purposes at pleasure, either by transferring their estates to strangers, by enlarging, diminishing, or altering them, to

and amongst themselves, at their pleasure, without observing that rigour and strictness of law for the possession of the conusee, as was requisite before the statute.

Vaugh. 50, Dixon v. Harrison. ‖(*a*) Bacon supports at length the contrary opinion. Uses, p. 39; and see Dy. 362 b, pl. 31.‖ Notwithstanding this statute, there are, as will be shown more particularly, three ways of creating a use or a trust which still remain as at common law, and is a creature of the courts of equity, and subject only to their control and direction. 1st, Where a man seised in fee raises a term for years, and limits it in trust for A, for this the statute cannot execute, the termor not being seised. ‖But if A, being seised in fee, bargains and sells to B for 500 years, the statute will execute the use in B; but if B afterwards assign the term to C, to the use of D, the legal estate will remain in C, and D will take a mere trust in equity. Gilb. on Uses, by Sugden, 80.‖ 2dly, Where lands are limited to the use of A in trust, to permit B to receive the rents and profits; for the statute can only execute the first use. 3dly, Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons: for here the lands must remain in them to answer these purposes; and these points were agreed to. 1 Abr. Eq. Cases, 383, Simpson v. Turner; ‖Doe v. Biggs, 2 Taunt. 109, 113; Kenrick v. Beauclerck, 3 Bos. & Pul. 175; Doe v. Ironmonger, 3 East, 533; Harton v. Harton, 7 Term R. 652; Keene v. Deardon, 8 East, 248; Gregory v. Henderson, 4 Taunt. 172; Knight v. Smith, 12 East, 455.‖

But before we consider the particular alterations introduced in the mode of conveying property by the 27 H. 8, it may be necessary to premise in general, that, since the statute, the limitation of uses is, in many cases, governed by the rules of law. As, if a feoffment is made to the use of J S and his heirs male lawfully begotten, with remainder over; this does not pass an estate *tail*, but a *fee-simple*, since the statute; for since the statute has brought uses into possession, they ought to be governed by the rules of estates in possession, as to the words that are essential to the creating of such uses. Now if there be no words essential to the creating of an estate, there is no such estate at common law, and the statute has not abrogated the common law so far as to allow an estate in being, without words necessary to create it; and here nobody is limited from whence the heirs of the tail may proceed. Also, no fee-simple can be created in uses, without the word heirs, since the statute, for the same reason.

Gilb. Law of Uses, 75; 1 Rep. 87 b. Before the statute the word *heirs* was not necessary to create an inheritance in a use, but now uses are turned into possession, they are governed by the rules of possessions at common law. {Willes, 180, Tapner v. Merlott; 1 Dall. 137, Vanhorn's Lessee v. Harrison.} See *antè*, with respect to the descent of uses. ‖And see Gilbert, by Sugden, note, p. 143.‖

So, if a man makes a feoffment to the use of himself for years, the remainder to B in tail, remainder to his own right heirs, and after B dies without issue, living the feoffor; the remainder to his right heirs is void, because it being contingent, there is no estate of freehold to support it, for there is no *tenant to the præcipe*, and the not having a perpetual tenant to the *præcipe* was an inconvenience the statute expressly designed to redress, and consequently to this rule the statute has submitted all uses.

2 Roll. Abr. 791; Gilb. Law of Uses, 76. Gilbert makes a *qu.* whether, to make this remainder contingent, the limitation should not be to the use of A for years, remainder to B in tail, remainder to the right heirs of C, for the case as above reported in Rolle does not appear to be contingent remainder. ‖The foregoing note is by Gilbert. Sir E. Sugden says, the answer to the query is, that as the remainder was limited to the right heirs of the settlor, it was the old and not the new use, and consequently not a contingent remainder; but upon the death of B without issue, the estate reverted to the settlor. This appears from the correct report of the case in Mo. 718. Gilb. by Sugden, 145.‖

(E) Of the several Sorts of Conveyances to Uses.

Likewise, if a man makes a feoffment in fee to the use of A for life, the remainder to his first son in tail, the remainder to B in fee; if A dies, his wife being *privement enseint*, and a son is afterwards born, he shall take nothing; for if the remainder does not vest at the determination of the particular estate, it shall never vest; for as it is said before, the statute does not change the nature and being of estates that were settled at common law, and a remainder *ex vi termini* supposes a particular estate, of which it doth remain.

Gilb. Law of Uses, 77. But see 10 & 11 W. 3, c. 10, for preserving contingent remainders to after-born children, ‖ which statute was occasioned by the decision in Reeve v. Long, 1 Salk. 227.‖

So, if a man makes a feoffment in fee to the use of A his son for life, and afterwards to the use of every person that shall be his heir, for life only, it is not good to the heir; for it is against the rules of common law, that a perpetual freehold for life only should descend, because it creates a perpetuity. But it seems in this case, as if the Chancery (since there is supposed a good consideration) would have executed a fee in A, according to the intent of the parties.

1 Rep. 138 a, Chudleigh's case; Gilb. Law of Uses, 77. If such a limitation were good, the inheritance would be in nobody.

In some cases, however, the statute operates against the rules of law. As,

If a man makes a feoffment in fee, to the use of A in fee; but upon payment of 100*l.* or any other contingency, to the use of B in fee, if the contingency happens, the fee shall be executed in B; for though, according to the rules of common law, a fee cannot be limited on a fee, because a fee-simple is the largest estate that can be limited, and therefore will not bear a remainder over, by way of limitation; and though this cannot be construed a conditional estate, because to avoid maintenance, the common law allows no stranger to take advantage of a condition; yet the necessities of commerce and family settlements induced the Chancery to pass by this rule, and the statute has executed the possession in the same manner and form as the party had the use. Now since he had but a conditional fee in the use before the statute, he cannot have an absolute and unconditional estate, since the statute; for that is to set up an estate directly contrary to the express words of the statute.

Gilb. Law of Uses, 78. ‖ See Sir E. Sugden's summary of the operations of the statute in altering the common law. 1st, In the transfer of the legal estate by a mere secret deed; 2dly, in the creation of estates not allowed by the common law. Gilb. by Sugden, p. 148.‖

It has been observed, that the statute of the 27 H. 8, introduced several sorts of conveyances quite opposite to the rules of common law; and this leads us to consider the several sorts of conveyances to uses, with their respective operations.

(E) Of the several Sorts of Conveyances to Uses.

THERE are but three sorts of conveyances to uses; the two first of which only will feed a contingent use, viz.: 1. Feoffment, fine, or common recovery to uses. 2. Covenant to stand seised to uses. 3. Bargain and sale to uses. By this last conveyance only no contingent use can be supported.

2 Sid. 158, Heyns v. Villars

(E) Of the several Sorts of Conveyances to Uses.

It is to be observed, concerning the operation of these conveyances, that by those under the first division, such as *feoffment*, *fine*, or *common recovery*, uses are raised by transmutation of possession; but by the second and third, that is, by *covenant to stand seised*, and by *bargain and sale*, uses arise without transmutation of possession, for the possession is still retained by the covenantor or bargainor, but for the use of another. Therefore,

Plow. 301, Sharrington v. Stotton. The covenantee or bargainee cannot have the land, because they had not livery of seisin, therefore reason vests the use in them, which is but a right in conscience to have the profits. Plow. *loc. cit.*

1. *Of those which raise Uses by way of Transmutation of Possession, such as*, 1. *Feoffment.* 2. *Fines.* 3. *Recoveries.*

The general nature and effect of these several assurances have been already explained under their respective titles. It may not be improper here, however, to take notice of this general rule, viz., That

On these conveyances which raise uses by way of transmutation of possession, no consideration is necessary.

Per Holt, C. J., 12 Mod. 161, 162, and 1 Rep. 176, Mildmay's case.

A use declared on an estate executed, needs no consideration.

Moor, 102, pl. 247, Calthorpe's case. It may be added, that when a use arises upon a consideration, the consideration must be presently executed. *Arg.* Cart. 140, in case of Garnish v. Wentworth. On the other hand it has been argued that if J covenant to stand seised to the use of J S and his heirs, in consideration that he shall be my counsellor, it is good, and the land passed presently, though it is not executed. *Arg.* Cart. 142, says this case was put by Popham in B. R. in one Pepplewell's case. ‖ See note (8), Harg. Co. Litt. 123 a.‖

It remains in the next place to consider,

Deeds declaring the Uses of Feoffments, Fines, and Recoveries.

And herein it is to be premised, that uses may be declared or averred on a feoffment, fine, or recovery of land; but on a bargain and sale of land no use may be declared or averred, but what the law doth make.

1 Rep. 176, Mildmay's case. ‖ Because a use cannot be declared upon a use; and see Gilb. by Sugden, p. 149.‖

Likewise on a covenant to stand seised to uses, no use may be declared or averred but what is contained within the deed.

1 Rep. 176, Mildmay's case; Dyer, 169, pl. 21.

It remains therefore to consider,

1. Who may declare uses. 2. To whom they may be declared. 3. In what manner they may be declared. 4. At what time they may be declared. 5. In what cases averments may be made of uses.

1. Who may declare Uses.

As the Court of Chancery does not set up rules of property contrary to the rules of law, they who have not a disposing power by the law cannot raise a use; and consequently baron and a feme covert cannot declare uses upon a feoffment so as to bind the wife.

Gilb. Law of Uses, 39.

But baron and feme may levy a fine which will bind the wife; for here the law allows her a disposing power, because she is privately examined; consequently, the Chancery must allow them to declare what is the design

of that fine; and therefore such declaration by them both shall bind the wife.

Moor, 197; 2 Rep. 57 a, Beckwith's case; 2 Roll. Abr. 798.

Likewise, if the husband only declare the uses, this shall bind the wife; for since she joins in the fine, she must be presumed to concur in the design of that fine, unless the contrary appears by some manifest sign of dissent.

2 Rep. 57 a; Roll. Abr. 798.

But, if the husband declares the uses of the fine one way by deed, and the wife another way by deed, this binds the husband during the coverture, but not the wife afterwards; for the husband cannot declare the uses without concurrence of the wife, because he has no estate; and she cannot be presumed to concur where the contrary appears by her deed: and she cannot declare the uses alone, because during marriage she is not *sui juris*, and without the husband she has no disposing power: and if there be no use declared upon this fine, it is to the use of the wife: for where there is no other intent of a fine declared, it is supposed to be designed as a farther security to the present possessor; and the use is still in the wife, since in this case she has not departed with it.

2 Rep. 57; Moor, 197, Beckwith's case. *Quære*, whether the declaration be not merely void. Gilb. Law of Uses, 40. A fine shall bind the wife, though she be within age; but it is said that such a fine is reversable for the nonage of the wife during her nonage. Cro. Eliz. 129; Charnoicke et Ux. v. Worsley, 2 Rep. 77 b; Lord Cromwell's case, Gilb. Law of Uses, 41.

A man of *non sane memory* may declare the use of a fine levied.

2 Rep. 58 a, Beckwith's case. So, an infant may limit a use upon feoffment, fine, or recovery, and he cannot countermand or avoid the use, without first avoiding the conveyance. Lord Bacon on the Statute of Uses, 355.

It is observable in general, that every man may declare and dispose of the use according to the estate and interest he has in the land: and therefore if two joint-tenants levy a fine, and declare the uses severally, each man disposes of his own moiety; but, if they declare no uses, they are seised as before.

2 Rep. 58 a, Beckwith's case.

So, if tenant for life and he in remainder in fee join in a fine, without declaring any uses, they are seised as they were before.

2 Rep. 58 a, Beckwith's case.

[If the remainder-man seals, and is party to a deed, wherein the tenant for life *alone* covenants to suffer a recovery, &c., to certain uses, this does not bind the remainder-man, though he in the remainder after join in suffering the recovery, &c.

3 P. Wms. 210, note B.

If tenant for life, remainder-man in tail, and reversioner in fee levy a fine, a declaration of uses by the tenant for life and remainder-man does not bind the reversioner, without his privity.

Roe v. Popham, Dougl. 25.]

If A seised of certain lands, and B a stranger join in a fine, without consideration, it shall be to the use of A, for since there is no consideration to part with the land, the use is still in him.

2 Rep. 58 a.

In like manner if A, seised in fee of certain lands, and B, a stranger,

join in a common recovery, without declaring any uses, the use shall arise to him that had the interest in the land, and not to the stranger.

2 Roll. Abr. 789.

So, where the father was tenant for life, remainder to the son in tail; a *præcipe* was brought against the father, who vouched the son, and a common recovery was had; and the indenture recited, that the recovery was made between the father and others: but, inasmuch as no proof was of the consent of the son to such declaration, nor was he party to the indenture, the court directed the jury to find the uses according to the estate which the parties had at the time of the recovery.(*a*)

Lat. 82, Argol v. Cheney; Palm. 405, S. C.; Noy, 7, S. C. (*a*) See farther letter (I) of *Resulting Uses*.

[The king may declare uses upon his letters patent, though indeed the patent of itself implies a use. But, if the king gives lands to J S and his heirs by letters patent to the use of J S for life: here, J S has only an estate for *life*, and the king has the inheritance without any office found; for implication out of matter of record ever amounts to matter of record.

Bac. Uses, 66; Sand. Uses, 208.

The queen may also declare uses.

Bac. Uses, 66; Sand. Uses, 208.

2. To whom they may be declared.

A use, it is said, cannot be raised to aliens. For an alien could not compel the feoffees to execute a use; for it is contrary to the policy of the law that an alien should plead, or be impleaded, touching lands, in any court of the kingdom.

Gilb. Law of Uses, 43. By Rolle, C. J.—The Chancellor cannot compel one to execute a trust for an alien. Sty. 21, The King v. Holland; All. 15 & 16. But according to Broke, a feoffment or gift to the use of an alien born is good, for a use is only a matter in conscience. Bro. *Feoffment to Uses*, pl. 29.

The king shall have the use of an alien; for the advantage which a man receives from his duty can extend no farther than the obligation of that duty reaches; but the allegiance of an alien is temporary, therefore so is his property; and since he is incapable of perpetual subjection, he cannot be protected in any estate that is of perpetual continuance; and the inconvenience is the same if this be a freehold at law, or a trust.

All. 15 & 16; Sty. 40; Gilb. Law of Uses, 43. But in this case it is said, the king shall not seize the land of an alien, unless it be executed in him by a decree in Chancery; for there was no right in *cestui que use* himself to seize the lands without a decree and the king has only the rights of the *cestui que use*. Sty. 40; Gilb. Law of Uses, 44 ‖A *trust* for an alien will be executed for the benefit of the king. All. 14; Sty. 40 3 Cha. R. 19.‖

Also, though the king cannot have feoffees to his use, because he cannot take but by matter of record, yet he may take it when the use is found of record, where an office is found of the whole matter.

Gilb. Law of Uses, 44.

Likewise, the limitation of a use to the poor of the parish of Dale is good, though no corporation: for though they are capable of no property at common law in the thing trusted, because the rules of pleading require persons claiming to bring themselves under the gift: and no indefinite multitude, without public allowance, can take by a general name; yet they are capable of a trust; for here the complainants do not derive to themselves

any right or title to the estate, but show that it has been abused and misemployed by the owners, contrary to conscience.(*a*)

Bro. *F. to Uses*, pl. 29; 1 Rep. 23–25; Gilb. Law of Uses, 44. ‖(*a*) There must in every case be a use capable of taking effect. Therefore, as was gravely observed in the reign of Edward the Fourth, a use in favour of Salisbury Plain, or of the Moon, is void. Bro. Abr. 339 b, pl. 37.‖

3. In what Manner they may be declared.

Before the statute of frauds, 29 Car. 2, c. 3, even a parol declaration of the uses of a fine was good. And

4 Mod. 269, Jones v. Morley.

Uses, even since that statute, may be declared by writing only without any seal.

7 Mod. 76, Shortridge v. Lamplugh. ‖A written declaration, if not by deed, will not control a prior declaration by deed; but where the first declaration is by writing merely, it may be controlled by a subsequent writing. Gilb. by Sugden, 101.‖

βA grant to A, for the use of B, is a use executed in B.

Willson v. Killcannon, 4 Hayw. 196.ℊ

If a use is declared by indenture, yet the parties may alter the use by other indenture at any time till the estate is executed, and the last indenture shall guide the use.

Moor, 107, pl. 249. Agreed by the justices in Andrew's case.

[But such other indenture must be by the consent of *all* the parties interested,(*b*) else it cannot control the first indenture. Thus, A was tenant for ninety-nine years, if he so long lived, remainder to trustees to support contingent remainders, remainder to the first and other sons of A in tail, remainder to A in fee. A having two sons, B and C, they all joined in a lease and release of the estate to certain uses, and there was a conveyance to suffer a recovery within twelve months to those uses: afterwards they, with the heir of the surviving trustee, joined in a lease and release to make a tenant to the *præcipe*, in order to suffer a recovery to the uses of the first indenture; but before any recovery was suffered, B the eldest son died, and after the death of B, and before the recovery was suffered pursuant to the above deeds, A and C by another deed covenanted to suffer a recovery to certain other uses; and before the expiration of the twelve months specified in the first deed, a recovery was suffered. The question was, Whether the first deed, declaring the uses of the recovery, and made by A, B, and C, should stand, in preference to that made by A and C alone? Lord Hardwicke clearly held, that the first deed by A, B, and C was a good deed to lead the uses of the recovery: that when A, B, and C, and the heir of the surviving trustee, made a tenant to the *præcipe*, they passed a defeasible estate to serve the uses of the first deed; and that the recovery suffered within the twelve months rendered that defeasible estate indefeasible, though one of the parties was dead before the recovery suffered: that the last deed was not sufficient to alter the uses declared by the first deed, because not made by the *agreement* of *all* the parties.

Stapilton v. Stapilton, 1 Atk. 2. See Durnford v. Lane, 1 Bro. Ch. R. 106;] {8 Term, 211, Doe v. Wichelo.} ‖(*b*) Who shall come within this description is in many cases a question of difficulty.‖

Where there is a *deed*, and a *last writing* by husband and wife, the last writing, though not a deed, amounts to a sufficient declaration of uses upon the fine, the fine being levied at *a time different* from the deed.

Comb. 429, Jones v. Morley. This writing was only between the husband of the

one part, and the wife of the other part. But the deed was between them and others. Carth. 410, S. C.; 2 Salk. 677, S. C.; 4 Mod. 261, S. C.; Parliament Cases, 143, S. C.; and judgment affirmed.

A declaration of the use, either *express or in law*, is sufficient; as, if A covenants with B for money to do all acts which B shall require for assurance to A and his heirs, and then levies a fine to B, this covenant and fine will give B the whole land.

Hob. 275, Clanrickard's case.

Where a bastard was seised of a manor and made his will, by which he devised the manor; and after he made a feoffment of the same manor to the use of such persons, and for such estates as he had declared by his last will, bearing date, &c., though this was now a *countermanded will*, it was sufficient to declare the use of the feoffment, and so no escheat.

Moor. 789, pl. 1090, in the Exchequer-chamber, Hussey's case.

It is not necessary in declaring a use, if there be a transmutation of possession, to use the very word use; any expression whereby the mind of the party may be known, that such an one shall have the land, is sufficient. *Per* Holt, C. J., in delivering the opinion of the court.

12 Mod. 162, case of Jones v. Morley.

4. At what Time they may be declared.

A declaration of uses may be made either before or after the time of making the assurance; for a subsequent declaration may direct the uses of a precedent assurance; and by

4 & 5 Ann. c. 16, § 15, it is enacted, that *all declarations or creations of uses or trusts of any fines or common recoveries manifested by deed*(*a*) *after the levying or suffering thereof shall be as good in law as if the act of* 29 *Car.* 2, *c.* 3, *for prevention of frauds or perjuries, had not been made.*

In an ejectment on a special verdict the following case was determined:—A and B his wife levied a fine, and four years afterwards declare the uses; in which deed are the words following, viz., "All and every fine or fines levied, or to be levied, shall be to the uses of this deed." Holt, C. J., delivered the opinion of the court, that the uses were sufficiently declared (the jury having found, that the fine was levied to the uses therein declared.) And that, notwithstanding the Statute of Frauds and Perjuries, a subsequent deed is now as good as it was before the statute. And that it was doubtful whether the statute extends to *uses*, because they are not mentioned there, but only *trusts*, yet that they took trusts and uses to be the same, in respect of trusts in their larger extent, &c., so within the statute of uses. Holt's Rep. 733, Bushel v. Burland; ‖ and 11 Mod. 197, S. C. In both books the case is loosely reported. (*a*) It would seem from the preamble to the 4 & 5 Ann. c. 16, § 15, and from the terms of the Statute of Frauds, to which it refers, that the word "deed" was inserted in the act by mistake; and Sir E. Sugden observes, that it is open to contend that uses may still be declared by writing only without seal, even after the assurance is made. Gilbert by Sugden, 115.‖

If A covenants to levy a fine before such a day, though the fine levied *differs from the indenture* in time, place, quantity of acres, or in the person that occupied it; yet, when the fine is levied, it shall be intended to be to the same uses in the indenture.

Arg. 3 Bulst. 251, Hagervil v. Hare, cites 2 Rep. 69, Lord Cromwell's case. But it may in such case be averred by parol to be to other uses. But, if the fine be levied in all things pursuant to the indenture, no averment can be but by writing; for in this case the indenture is *directory to the fine*, and in the other case it is *but evidence*. Cro. Ja. 29, Countess of Rutland v. The Earl of Rutland.

If a precedent indenture be made to direct the uses of a subsequent assurance, it is but directory till the assurance is made, and then the land is

bound, and the conusor or recoveree cannot by any act of his, after the recovery had, charge or avoid it: but, if the declaration be subsequent, if, in the interim between the assurance had and the declaration of the uses, the conusor or recoveree sells, gives, or charges the lands to others, this subsequent declaration will not subvert the mesne estates, charges, or interests, unless it can be otherwise proved, that by a certain and complete agreement of the parties, the assurance was had and made to these uses.

2 Rep. 26, Countess of Rutland's case; 9 Rep. 10, 11, &c., Dowman's case.

But the distinctions between precedent and subsequent declarations will best appear from the consideration of the following head, viz.,

5. In what Cases Averments may be made of Uses.

With regard to averments it is to be observed, that where a use is expressed upon any feoffment, &c., there no averment shall be received to prove any use contrary to the use expressed; but in case no use is expressed in the assurance, there, other uses than what the law would make upon the assurance may be averred, and proved to have been agreed upon, and the assurance shall be to such uses.

9 Rep. 10, Dowman's case.

If by the words of a deed, upon a valuable consideration, a man takes it to his own use, or to the use of another, there can be no averment that he takes it as a trustee in any other manner; for there is such a sanction given to all solemn acts of contracting, that they cannot be construed directly contrary to their own expressions.

Gilb. Law of Uses, 6; 1 And. 313. Where the deed is not upon a valuable consideration, it is looked upon as a fraudulent conveyance against the trust.

Thus, if a feoffee to uses makes a feoffment in fee by deed, upon an equitable consideration, to J S and his heirs, to the use of his heirs expressly, J S shall be seised to his own use, though he had no notice of the former trust; for where the deed expresses the use, an implied one cannot be averred.(*a*)

Gilb. Law of Uses, 7. (*a*) It seems at common law a use might have been raised by word, upon a conveyance that passed the possession by some solemn act as a feoffment; but, where there was no such act, there, it seems, a deed declaratory of the uses was necessary; for as a feoffment which passed the estate might be made at common law by parol, so by the same reason might the uses of the estate be declared by parol: but where a deed was requisite to the passing of the estate itself, it seems it was requisite for the declaration of the uses, as upon a grant of rent, or the like. So, it seems, a man could not covenant to stand seised to a use without a deed, there being no solemn act; but a bargain and sale by parol has raised a use without, and it has been held to do so since the statute. In cities exempted out of the statute, it has been held, that if a fine be levied of a rent, no use can be limited of it without deed; but now by 29 Car. 2, c. 3, all declarations of trusts, other than such as arise by implication of law, are to be in writing, and signed by the party, who is by law enabled to declare such trust, or else it must be by his last will in writing. Gilb. Law of Uses, 270, 271.

Where the uses of a recovery are declared by deed precedent, no new or other use can be averred by parol, unless there was some variance between the deed and the recovery; but in case of a deed precedent, if the party set up other uses, he must confess and avoid: but, where they are by deed subsequent, new or other uses may be averred without showing the deed, though there be no variance, &c., because there was an intermediate time when there might be such agreement made, and the uses arise by the

recovery according to that agreement; and if a deed subsequent be set up, the other may traverse those uses.

2 Salk. 676, Tregame v. Fletcher.

But, where there is a variance between the deed and the recovery or other assurance, and no averment of the uses can be made, there, they must be left to the construction of law.

There is a difference likewise with respect to averments between parties and strangers. Thus,

If a declaration of uses be subsequent to a fine or recovery, it is good; but there may be an *averment*, that they were to *other uses;* yet with this difference, that where the declaration is subsequent, there, the heir of the conusor is *estopped to aver* other uses, but a *stranger* is not. But, where the deed is precedent, there, neither the heir nor the stranger is estopped to aver other uses, in case the *fine varies in any circumstance:* but, if the fine was levied pursuant to the deed, no proof whatsoever, either by writing or parol, shall be admitted, that the fine was to other uses than what are contained in the deed, that being an estoppel to the parties. *Per* Holt, C. J.

Comb. 429, Jones v. Morley.

It has been held, that a deed of uses *precedent* to a recovery may be explained by a deed *subsequent*, as in the following instance:—Feme, before the 27 H. 8, of uses, being seised of land, suffered a common recovery, and intending to marry A B, she, before the marriage, declared by indenture that the feoffees should be seised *to the use of herself and* A B, whom she intended to marry, *and their heirs*. The feoffees executed an estate after the marriage to the husband and wife, and their heirs in fee, without any use expressed. Afterwards the baron and feme *by other indenture declared, that the first indenture was mistaken;* for that it *should have been to the heirs of their two bodies*, and for default *to the heirs of the wife*. And they covenant, bargain, and *agree, to stand seised to the use of* themselves in special tail, and after, to the right heirs of the wife; and the husband covenanted, if the wife died without issue, during his life, that he would execute an estate accordingly. The wife died without issue, and after the statute of uses the baron died seised; and it was held, that the *first indenture was corrected by the second*, and the first use is sufficiently altered without estate executed, and the considerations are reasonable and sufficient, and adjudged for the heir of the wife.

Dy. 307 b, pl. 71, Vavasor's case.

A consideration which stands with the deed and not repugnant to it may be averred.

Rep. 40, Bedel's case.

It now remain to consider,

2. *Those Conveyances which raise Uses without Transmutation of Possession, such as,*

1. Covenants to stand seised to Uses. And, 2. Of Bargain and Sale.

1. Covenants to stand seised to Uses.

This conveyance not having been hitherto treated of, it will be necessary to inquire more fully into its nature and effect.

The original of it was in this manner. Before 27 H. 8, when any man covenanted to stand seised to the use of another, the remedy was twofold.

Gilb. Law of Uses, 110.

(E) Of the several Sorts of Conveyances to Uses.

First, By action at common law upon the covenant, and thereby damages only were recovered.

Gilb. Law of Uses, 110.

Secondly, in Chancery; and there the remedy arose thus: When any man covenants to do a thing, the party is first bound in conscience to perform the thing itself; and if that cannot be, then to render damages for not doing it; therefore the Chancery that examines the conscience of men's actions requires a specific performance of the thing itself, where it can be had: but the common law could not carry this covenant so far without offering violence to its own rules; for the common law requires livery; and to allow an action for a specific performance makes the agreement binding without it; but by the 27 H. 8, these uses are executed, and therefore no action lies; for there can be no complaint for not transferring the thing, when the statute transfers it to the party himself.

{All the circumstances necessary to make a good deed of covenant to stand seised to uses are these: 1. That there be a sufficient and proper consideration. 2. That there be a deed. 3. That the grantor or covenantor be actually seised of the land at the time of the grant. 4. That there be apt words to convey lands.

1 Dall. 138, Vanhorn's Lessee v. Harrison; Willes, 685, Roe v. Tranmarr.}

1. *Who may covenant to stand seised, and to whom.*
2. *What Consideration is necessary to a Covenant to stand seised, and how far it extends.*
3. *By what Words a Man may covenant to stand seised.*
4. *The Effect of a Covenant to stand seised.*

1. *Who may covenant to stand seised, and to whom.*

The king cannot be seised to a use, because there is no means to compel him to perform; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king, who is the universal judge of property, ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate, as a trustee.

Poph. 72, Dillon v. Fraine; Hardr. 468, Pawlett v. Attorney-General; 1 Roll. Rep. 332, Cooper v. Franklin and another. But see Vern. 439, *per* Master of the Rolls, in case of Lord Kildare v. Eustace, relating to the Irish forfeitures, where he says he takes the king to be in nature of a trustee, notwithstanding the general received opinion to the contrary. The king cannot be seised to use, because he cannot be obliged to execute the possession to the use by a subpœna, since if he disobeys he cannot be compelled to obedience by imprisonment. Jenk. 195, pl. 1. [The king cannot be seised to a use; no, not where he taketh in his natural body, and to some purpose as a common person; and, therefore, if land be given to the king and J D, *pour terme de leur vies*, this use is void for a moiety. Bac. Uses, 56. Like law is, if the king be seised of land in the right of his duchy of Lancaster, and covenant by his letters patent under the duchy seal to stand seised to the use of his son, nothing passeth. Ibid. 57. Like law, if King Richard the Third, who was feoffee to divers uses before he took upon him the crown, had, after he was king, by his letters patent granted the land over, the uses had not been renewed. Ibid. The king shall not stand seised to a use; for all the lands he is seised of, he is seised *in jure coronæ* for the maintenance and support of his crown and dignity, and the well-government of the commonwealth, which is a use the law designed him *primitus*, and, consequently, it is exclusive of all other uses. Neither can it be imagined that the king should, in point of honour, stand seised of lands only to the benefit and advantage of another, and so be a sort of bailiff to him. Gilb. Uses, 170, 171.

The queen (speaking not of an imperial queen, but by marriage) cannot be seised to a use; for though she be a body enabled to grant and pur-

chase without the king, yet, in regard to the government and interest the king hath in her possession, she cannot be seised to a use.

Ld. Bacon on the Statute of Uses, 347.

Bodies politic are not capable of a use or trust, because they are bodies framed at the will of the king, and are no further capable than he wills them; and it is his will that they should purchase for the common benefit, and for the ends of their creation, and not that they should take anything in trust for others. Besides, being incorporate, the Chancery had no process on the persons to compel them to discharge their trust.(*a*)

Gilb. Law of Uses, 5; 1 Rep. 122; Poph. 72. ‖ See Sir E. Sugden's note, Gilbert, p. 7.‖ [(*a*) But bodies politic may be trustees, and in such case are considered in a court of equity as individuals. Mayor, &c. of Coventry v. The Attorney-General, 2 Bro. P. C. 236; 2 Ves. J. 46.]

Aliens, and persons attainted, are not capable of a use, for they can take for no man's benefit but the king's.

Gilb. Law of Uses, 5; 1 Rep. 122; Poph. 72. The king shall have the use of an alien, because as his allegiance is temporary, so ought his property to be. All. 15 & 16: Sty. 40; Gilb. Law of Uses, 43. ‖ See *ante*, p. 132.‖

A disseisor, abator, or intruder, cannot be seised to a use, for they take it under no trust, but defeat the estate to which the trust was subjoined; and the Chancery had no power to try the right of inheritance between them, for the right of that title is triable only at common law. But, if he who has the use exhibits a bill against the feoffee to a use, the Chancery will order him to try the title with the disseisor at common law.

1 Rep. 122, a, 139 b.

A lord by escheat shall not be seised to a use, because he is in by a title paramount, and seised of an estate antecedent to that to which the use is annexed. Lord of a villain, a lord that enters for mortmain, or recovers by *cessavit*, or a tenant by the courtesy cannot be seised to a use, for they claim by the general laws and statutes of the kingdom, which the Chancery has no power to alter, and do not take as substitutes under those private contracts, to which trusts are annexed, and so cannot be punished as corrupt breakers of that trust which they never undertook.

1 Rep. 122 a; Bro. *Feoff.* 138 a.

Tenant in tail cannot covenant to stand seised so as to change a use, unless during his own life.

Cro. Jac. 400, Cooper v. Franklin; Hetl. 110, Bromfield's case. None can be seised to the use of another, but such as can execute an estate according to the directions of *cestui que use*, which tenant in tail cannot; for it was the intent of the statute *de donis* that he should have the lands and the profits of them; and if he should execute an estate to a use, his issue would be entitled to their formedon. Bro. *Feoff. al Uses*, pl. 40; 2 Roll. Abr. 780; 1 Inst. 19 b; Gilb. Law of Uses, 11, and 205, &c. [Whether tenant in tail can stand seised to a use, has been *vexata quæstio*, and, indeed does not appear to be quite settled at this time. On the one hand, Lord Coke, (Co. Litt. 19 b; 2 Co. 78 a;) Sir G. Croke, (Cro. Ja. 400, 401; Bulstrode, (3 Bulstr. 186;) Sir F. Moore, (Moore, 848;) and Rolle, (1 Roll. R. 384; 2 Roll. Abr. 780,) expressly tell us, that it was settled in the case of Cooper and Franklyn, that a tenant in tail neither *before* nor *since* the statute could stand seised to the use of another person, expressly or impliedly. Whilst on the other hand, Godbolt directly asserts, that the case of Cooper and Franklyn was determined quite the contrary; viz., that a tenant in tail could stand seised to an *express use*, though not to an *implied one*, (Godb. 269.) And Lord Bacon, in his Reading on the Statute of Uses, gives it as his decided opinion, that a tenant in tail may stand seised to an *express use since* the statute; for the statute, says he, does not save the right of tenant in tail; and the reason why a contrary construction was had before the statute, was because the right of tenant in tail was expressly saved by 1 R. 3,

c. 1. (Bac. Uses, 57.) Of this opinion seem also Perkins, (Perk. § 534, 537;) Manwood in Walsingham's case, (Plowd. 555,) and Dyer, (Dy. 311 b, 312 a;) and Mr. Saunders inclines to the same opinion, in his Essay on the Nature and Laws of Uses and Trusts, (Saund. 144, 145, &c.)] ‖See Gilb. Law of Uses by Sugden, p. 19, note, and Cornish on Uses, p. 118.‖

If tenant in tail by indenture, on consideration of marriage, covenants with another that A and B shall be seised to his use for term of his life, and after his decease to the use of his son and heir apparent; by this covenant there is no use changed, unless only during the life of tenant in tail.

Per cur. Het. 110, Bromfield's case.

So, if tenant in tail covenants to stand seised to the use of himself for life, remainder to his eldest son in tail; since he had only the power of disposing of an estate for life by the statute *de donis*, which he hath not passed out of himself, it is still in him as it was before; and the remainder is void in its creation, and therefore can be no execution of it, for the execution must be immediate by the statute of uses; and therefore a fine afterwards levied cannot help it.

Cro. Eliz. 895, Bedingfield's case.

But, if tenant in tail covenants to stand seised(*a*) to the use of A and his heirs, or to the use of A for life,(*b*) remainder to B in fee, the covenant is not void, but puts the estate out of the covenantor. *Per* Holt, C. J., in delivering the opinion of the court.

2 Salk. 620, Machil v. Clark. (*a*) The covenant is good, and passes a base fee to A. *Per* Holt, C. J., Comyn's R. 121, pl. 84, S. C.; [Stapilton v. Stapilton, 1 Atk. 8, S. P.; Goodright v. Mead, 3 Burr. 1703, S. P.] (*b*) And the remainder is good, though the tenant in tail dies during the life of A, until it is avoided by the issue. Comyns's R. 121. *Per* Holt, C. J., in S. C.

Yet, if tenant in tail covenants to stand seised to the use of A and his heirs after his death, it is void.

2 Salk. 620, Machil v. Clark, 7 Mod. 26, S. C. & P., because it is to commence at a time when the right of the estate out of which it would issue is in another person by a title paramount the conveyance, viz., *per formam doni.*

So, if tenant in tail covenants to stand seised to the use of himself for life, remainder to J S and his heirs, it is void; for the remainder is to take effect after his death, when by his death the title of his issue commences; and the covenant, as to the estate for life to himself, is void, in this case, because there is no transmutation of possession. Such a covenant is in any case good only in respect of the remainders; and since the remainders are void, the covenant and the first estate are likewise void.

2 Salk. 620, Machil v. Clark; 7 Mod. 18—28, S. C. accordingly.

Likewise a tenant for years, since the statute of uses, cannot be seised to any use; for a tenant for years has only a possession, and not a seisin which the statute requires.

Jenk. 195, pl. 1.

But a tenant in dower may be seised to a use, for a tenant in dower claims by the marriage agreement, and a sufficient provision is made for her by law, which is a third part of her husband's estate; and since a private contract is the original of her title, she continues the estate of her husband as he purchased it, and under the same trust and agreement.

Hardr. 469; Co. Lit. 239; 4 Rep. 122; *contrà*, Bro. *F. to Uses*, 338, § 40. On this point we find several contradictory opinions in the books. Some say that tenant in

dower claims in the *per*, that is, by or from her husband; according to others, she is in, in the *post*, and claims by disposition of law, and does not come in by privity of estate. Therefore *qu.*, and consult the authorities in the margin; and see farther Gilb. Law of Uses, pl. 11 and 171.

An occupant also may be seised to a use, for an occupant continues the estate of tenant for life, as his substitute, and so must take it as he had it.

Hardr. 468. But see Bro. *Feoff. to Uses*, 338 a, § 10, *contrà*.

It is a rule, that a man cannot covenant that another shall stand seised of lands whereof the seisin is in himself, for this will not raise any use, but will stand merely on covenant. Thus, where A seised in fee, in consideration of the marriage of B, his son, and a marriage portion, covenanted to levy a fine to B, and that B should stand seised to the use of A the father, and his heirs, till the marriage had, and after to B's own use in tail, with divers remainders over; and A covenanted in the same deed, that he was seised in fee, and so should be till the use vested in B the son; it was resolved by Powell and Rooksby, Js., the only judges then in court, that A could not covenant that the son should stand seised of lands whereof the father is seised; and the subsequent covenant was intended against encumbrances only, as is usual in such cases, and not to raise any use.

3 Lev. 306, Barrington v. Crane.

2. *What Consideration is necessary to a Covenant to stand seised, and how far it extends.*

It has been already shown, that on those conveyances by which uses are raised by transmutation, no consideration is necessary; but conveyances by covenant to stand seised, or by way of bargain and sale, will not operate to uses without a consideration.(*a*)

Cart. 143, Garnish v. Wentworth. (*a*) Considerations to raise uses are threefold, as considerations of blood or of marriage, (which, as will be shown, are good considerations on covenants to stand seised,) and consideration of money, which is the only good consideration on a bargain and sale. See title *Bargain and Sale*, letter (D).

Lord Bacon says, there is no reason in the law why a deed should not raise a use without any consideration. But he adds, that it is a reason of Chancery, because no court of conscience will enforce *donum gratuitum*. But where money is paid whereby a man's fortune is lessened, or where it is for the establishment of his family, then it is good in Chancery. Lord Bacon's Read. on Stat. of Uses, 310, &c.

With respect to covenants to stand seised, considerations of blood or of marriage are good considerations to raise uses.

{In New York a deed from a father to his son *for a pecuniary consideration* has been holden to be a covenant to stand seised. In England, it is only since the statute of enrolments (27 H. 8, c. 16) that it has been established that no considerations but blood or marriage are sufficient to raise a use by way of covenant to stand seised; before that statute covenants to stand seised could be supported by pecuniary considerations. And as that statute was never in force in New York, because local in its provisions, the law continues there as it was previously in England. 1 Johns. Ca. 91, Jackson v. Dunsbagh. Sanders on Uses, 434—440.}

And first, Of consideration of blood. If a man parts with any lands in advancement of his issue, and to provide for the contingencies and necessary settlements of his family, it is fit the Chancery should make them good conveyances, though they want the ceremonies of law; for it is the design and intent of the Court of Equity to mitigate the severities of law, so as they may best comply with the peace of families; for their establishment is part of the nature and end of government.

Gilb. Law of Uses, 47; Cart. 139, Garnish v. Wentworth.

Therefore, if a man, in consideration of natural love and affection, covenants to stand seised to the use of his son or brother, this is a good use.

Gilb. Law of Uses, 47; Cart. 139, Garnish v. Wentworth.

A consideration of natural affection expressed to one child will, by construction of law, be extended to others. Thus, if a man having issue three sons, covenants in consideration of natural affection to the eldest son, to stand seised of certain land to the use of himself for life, and after to his eldest son, and the heirs male of his body; and for default of such issue, to the use of his second son and the heirs male of his body; and for default of such issue, to the use of the third son, &c.; this is a good consideration to raise the use to his younger sons; for though the consideration of natural affection be limited only to the eldest, yet this is equal to all the sons, and therefore the law will supply it without expression; for if nothing had been expressed, it had been a good consideration by implication of law.

2 Roll. Abr. 782, 783, between Bond and Edmonds, *per curiam.*

The consideration of natural affection is good likewise to raise a use to children unborn. Thus, consideration of affection to the heirs male of the covenantor which he should beget on the body of A his wife, is a good consideration to raise a use by way of covenant to the said heirs of his body, for every one is bound in nature to provide for his children.

Plow. R. 303, Sharlington et al. v. Strotton. ‖ This important case is full of legal learning, and of the scholastic conceits and pedantries peculiar to the times.‖

So, for advancement of his heirs male, a man may covenant to stand seised to the use of himself and the heirs male of his body; and thus shall raise a good estate-tail: for though all the estate-tail is in himself, yet this is for the benefit of the heir male though it is *in futuro*, and not *in præsenti*, for none can know who shall be his heir; for *solus Deus facit hæredes.*

7 Rep. 13 b, [14 a,] Englefield's case. The reason is, for that a man may modify a fee that continues in him, though he cannot take a fee as *de novo* when he has the old one in him. Gilb. Law of Uses, 209.

But if a man, in consideration of his care and love which he bears to J S, called, named, and *reputed* one of his sons, (where he was his bastard son,) covenants to stand seised to the use of the said J S, this is no good consideration to raise any use.

2 Roll. Abr. 785; Dyer, 374, pl. 16, Worseley's case. The reason is, for that in law he is not supposed to be of the blood of his father, but is considered as a mere stranger, for whom no one is presumed to have a natural affection. See the case last mentioned, and see Gilb. Law of Uses, 48 and 206. But a bastard may take by feoffment, though not by covenant to stand seised in consideration of natural affection. 1 Leo. 197, Lord Pagett's case.

So, likewise, if a man covenants, in consideration of blood and of the marriage of his bastard daughter, to stand seised to the use of the bastard daughter, this is not a good consideration to raise a use, because in the law she is not his daughter, but *filia populi.*

2 Roll. Abr. 785, between Frampton and Gerard. But, if a man covenants, in consideration of natural love and affection, blood and marriage of his bastard daughter, to levy a fine, and that the conusee shall stand seised to the use of the bastard daughter, though this be not a sufficient consideration to raise a use upon a covenant, yet it is expressive of the intent of the party, and therefore shall serve as a sufficient declaration of a use upon the fine, where there needs no consideration. Gilb. Law of Uses, 207.

Fraternal love, and continuance of the land in such of the blood of the covenantor, is a good consideration to raise a use by way of covenant; for

this is a consideration of blood, and the brother is one of the next degrees after his parents and children; and they who are next in blood are next in love by intendment of the law.

2 Roll. Abr. 785, cites Pl. Cr. 307, [Sherington and Pledat v. Stratton.

Thus if A by indenture made between him of the one part, and B his brother, (naming him so in the deed,) and C and D who are strangers to him, in consideration of love and affection which he bears towards his wife and children, and for their maintenance and stay of living, and to the intent to settle his land in his name and blood, covenants with the said B, C, and D, to stand seised to the use of himself for life, and after to his wife for life, and after to the said B, C, and D, and their heirs upon trust, that they should make such uses as he himself shall appoint, and after to raise portions for his children, and after to G his second son in tail, &c., though no use can arise by this indenture to C and D, who are strangers to the consideration of blood, and so this is void as to them; yet the use shall arise for all to B, who is his brother, and so named in the deed, which is within the consideration. Trin. 14 Car. This was a special verdict between Fox and Wilcocks, and argued at the bar, but it abated by death. And after, upon a new special verdict between Smith and Busbie, it was adjudged *per curiam*, that the use shall well arise to B to perform the trusts specified in the indenture.

2 Roll. Abr. 783; S. C., Cro. Car. 529, by the name of Smith v. Risley et al.; S. C., Sir Wm. Jo. 418, by the name of German v. Risley.

But consideration of ancient acquaintance, or of being chamber fellows, or entire friends, shall not raise any use. Agreed *per cur.* between Ward and Tuddingham.

2 Roll. Abr. 783.

Also, if a man, in consideration that B was bound in a recognisance for him, bargains and sells land to the other, that is not good.

2 Roll. Abr. 783, adjudged between Ward and Lumbard.

Neither will the consideration of a surname raise a use, as was resolved in Sir Christopher Hatton's case, who had a sister's son called Newport, and in consideration of his changing his name to Hatton, he covenants by deed to raise a use to him, this consideration was adjudged not sufficient to raise a use.

Jenk. 81, pl. 60.

2. With respect to considerations of marriage,—A man may covenant to stand seised to the use of A his wife, and the consideration that she is his wife will raise a good estate to her, for this is a good consideration in law.

Thus, if in an indenture between A and his wife of the first part, and B their son of the second part, and C their son of the third part, the said A, in consideration of natural affection and paternal love which he has to his said sons, and for their better advancement, and to the intent that the lands should continue in his name and blood, covenants to stand seised to the use of himself for life, the remainder to his said wife for life, the remainder to his said sons; here, the use limited to the wife imports a consideration of itself.

7 Rep. 40, Bedall's case.

Likewise a man may covenant to stand seised to the use of A, the wife of his brother, in consideration that she is the wife of his brother, and this

shall raise a good estate to her; for the love which he bears towards his brother, extends in his right to his wife.

Plow. R. 307, Sharington v. Strotton.

So also, the consideration of marriage *to be had*, will raise a use, because the present estate is to the baron, and what is limited to the feme is only a remainder; *per* Twisden, J.

Sid. 83, in case of Stephens v. Brittridge.

Likewise, if a man covenants in consideration of natural love and affection to his son, to stand seised to the use of his son for life, the remainder to such wife as the son shall afterwards have for life, the remainder to the first son of the son and wife begotten, &c.; though the wife be a stranger to the consideration, (admitting it,) yet the estate limited to her is well raised for the subsequent estate which is within the consideration.

2 Roll. Abr. 786, between Bould and Winston; Noy, 122, S. C. The wife is within the consideration, because the covenantor intended the advancement of his posterity, and without a wife the son cannot have a lawful posterity.

But, if a man, in consideration that B shall marry his daughter, covenants to stand seised to the use of B and his daughter, the remainder to C, this is a void remainder to C, because he is a stranger to the consideration.

Plow. R. 307, Sharington v. Strotton.

It is to be observed farther with regard to the extent of these considerations, that if a man covenants upon consideration to be seised to the use of himself for life, and after to the use of his son; but he says further, that his meaning is, that his wife shall have it for her life; *per* Periam, J.—This is not a void clause, but good to the wife.

Ow. 85, in Carter v. Kingsted.

So also, where A, in consideration of love, and for settling the land in his name and blood to his eldest son, covenants to convey before Easter in trust for himself for life, remainder to B his eldest son in tail, &c., and also covenants to stand seised from and after Easter, of so much of the said lands as should not be sufficiently conveyed, to the said several uses, intents, and purposes, and no assurances were made before Easter; it was resolved, that the uses and estates raised by this covenant being in consideration of love to his son, &c., (no estate at all being executed before Easter,) the covenant extended to all: though it was objected that the words being, that of so much of the lands, &c., the intent was that he would stand seised when part was executed and sufficiently conveyed, but when no part was executed, it was not his intent that all should be raised by covenant; but this was not allowed, for the consideration being sufficient, the covenant well extends to all, there being nothing conveyed by the estate executed.

Cro. Ja. 180, pl. 19, Cross v. Faustenditch.

There is a difference between a covenant to stand seised and a feoffment; for if a man covenants to stand seised to the use of A, a stranger, for years, &c., remainder to B his son in tail, this is void as to A for want of a consideration, and the use vests immediately in B, and a void use is as if no use be limited; and if no use be limited, B must take immediately, and not by way of remainder, else he cannot take at all; for a remainder *ex vi termini* supposes a particular estate, and B must not be excluded, because uses being creatures of equity, the intent of the parties must be

made good as far as possible, where there is a just and good ground for any part of the conveyance.

1 Leon. 195, *et sequent.*, Lord Paget's case. But see Plow. Com. 307, *contrà*. And a distinction is there taken, that if the limitation to the stranger precedes the limitation to the blood of the covenantor, there it is good to the stranger; but that if it is subsequent, it is void. Therefore *Qu.* Gilb. Law of Uses, 113.

But, if a man makes a feoffment in fee to the use of A and a stranger, or bastard for life, the remainder to his son in tail, this is good to A; for upon a feoffment there needs no consideration to raise the use, as has been said.

1 Leon. 197, Lord Paget's case.

There is another difference likewise observable; for if a man raises uses upon a fine, feoffment, or recovery, he may reserve to himself a power of making leases; but he cannot do it on a covenant to stand seised, or on a bargain and sale; for upon a fine, feoffment, or recovery, a use may be raised without a consideration, and therefore will arise to the lessees without consideration; and the former estates which were raised without consideration, may be defeated without it; but in a bargain and sale, and covenant to stand seised, no uses will arise without consideration, therefore not to the lessees; for where the persons are altogether uncertain, and the terms unknown, there can be no consideration; for which reason, the former estates, raised upon good consideration, cannot by such lessees be defeated.

1 Rep. 176 b, Mildmay's case.

[Where there is a feoffment by deed to a relation and his heirs, but nothing can pass by the feoffment for want of livery of seisin; yet as there is an agreement by deed, and the parties are relations, the law holds that a consideration for raising a use, and construes it a covenant to stand seised to the use of the person specified in fee; and the estate passes, not by feoffment, as the deed says, but by virtue of the statute of uses; and *ut res magis valeat, &c.*, that instrument called a feoffment shall operate as a covenant to stand seised.

Per Wilson, J., 2 Ves. J. 226. ‖This construction has prevailed even in a case where the land was conveyed by lease and release, but the release, as such, was void, because it limited a freehold to commence in *futuro*. Lord C. J. Willes, in delivering judgment, said, that although formerly, according to some cases, the mode or form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise, and he approved of the rule. As to Samon v. Jones, and Hore v. Dix, he said he did not understand them; and if he had sat in judgment on those cases he should have been of a different opinion. See Roe v. Tranmer, 2 Wils. 75; Willes, 662; and he expressed an opinion against those cases in Doe v. Salkeld, Willes, 673; and see Thompson v. Attfield, 1 Vern. 40; Shove v. Pincke, 5 Term R. 124, 310; Ex parte Earl of Ilchester, 7 Ves. 374.‖

3. *By what Words a Man may covenant to stand seised.*

It is a general rule, that words shall be construed so that the deed may stand if possible.

March, 56.

Thus, if a man, in consideration of natural love, and for augmentation of his daughter's portion, gives, grants, bargains, and sells, aliens, enfeoffs, and confirms, certain lands to J S his daughter, with a special warranty, and the deed is enrolled, this enures by way of covenant to stand seised in respect to the consideration.

Vent 138, *et sequent.*, Crossing v. Scudamore.

But, if the consideration be not expressed in the deed, it seems no use arises.

Gilb. Law of Uses, 115.

Likewise if a man, in consideration of marriage of his son's daughter, covenants that his land shall descend, come, and remain to him or her, this is only a covenant executory, upon which an action lies, and the force of the covenant is not to alter the descent; but it is no covenant to stand seised, whereby he may be entitled in Chancery to a specific performance.

Moor, 122, pl. 267; Cro. Eliz. 279; Blitheman v. Blitheman, Gilb. Law of Uses, 115. Here the seisin of the father is not appropriated to the several uses, but only a remainder limited after the father's death, which cannot be without a particular estate, nor that without a particular contract, and no man can contract with himself. Gilb. Law of Uses, 60.

Also, if a man seised of a *reversion expectant* upon an estate for life, gives, grants, and confirms the same to his son in fee, in consideration of natural love and affection expressed in the deed, to the use of himself for life, the remainder to his son in tail, the remainder to a daughter, without attornment or enrolment, this conveyance is void, and cannot endure by way of covenant to stand seised, for if it enures by way of covenant to stand seised, the legal estate, out of which the uses rise, remains in the covenantor: but the intent of the conveyance is to raise the uses by way of transmutation of possession, and to transfer the freehold, out of which the uses are to rise to the son; but this conveyance will not pass that freehold for want of attornment, and so the uses can never arise by this deed.

2 Vent. 38; Samon v. Jones, Sid. 25; Hore v. Dix, Gilb. Law of Uses, 115. ‖See observations of Willes, C. J., on these cases. 2 Wils. 75; Willes, 673, 682; and see Gilb. on Uses by Sugden, 253, *notà*.‖

So, where A, seised of land in possession and in use, covenanted on the marriage of his son with the daughter of J S that the son, immediately after his decease, should have in possession or in use all his lands according to the same course of inheritance they then stood in; and that all persons then seised, or thereafter to be seised, should be seised to the same use and intent; it was held, that the fee-simple of the use was not out of the father, nor was it changed, and that, as it was, it was only a covenant: but perhaps it might be otherwise, had the words been, that immediately after his decease the land should enure and remain to the son.

Dy. 55, Lord Burgh's case.

So, where the father, in consideration of marrying his son, covenants, &c., that he, &c., has not made, nor shall make any grant, &c., of the said lands, but that all the said lands, &c., shall descend, remain, and come in possession and use to the said son and the heirs male of his body, &c., no use is created or altered by those words.

And. 25, pl. 55. ‖See Gilbert by Sugden, p. 109.‖

Bridgman, C. J., took a difference between covenants obligatory and covenants declaratory; for covenants declaratory serve to limit and direct uses, but covenants obligatory (as for enjoyment free of encumbrances) shall never be construed to raise a use, inasmuch as they have another effect.

Sid. 27, pl. 7, in case of Hore v. Dix.

(E) Of the several Sorts of Conveyances to Uses.

4. *The Effect of a Covenant to stand seised.*

It is a rule, that no covenant to stand seised can pass a use unless the covenantor has seisin of the estate at the time of the contract. Thus,

If a man covenants to stand seised of the manor of D, which he shall hereafter purchase, to the use of J S, and he afterwards purchases the manor, yet this is void.

2 Roll Abr. 790.

So, if a man covenants to stand seised of the land that he shall hereafter purchase to the use of his son, and after purchases land to the use of himself and his heirs, the fee is in the father.

Noy, 19, Yelverton v. Yelverton; Cro. Eliz. 401, S. C.

For if a man binds any lands, you must suppose him to have a power to oblige them; but he that hath no interest, hath no power to oblige them; and therefore such a covenant in equity, before the statute, could not oblige him to a specific performance, for that were in equity to bind the land, which is absurd; and since the covenant is void in equity, there can be no execution by the statute; for the rules of law are equally strict in avoiding this repugnancy; for in law, every disposal supposes a precedent property; and, by consequence, every covenant to stand seised presupposes a precedent seisin.

Gilb. Law of Uses, 116.

|| So, if there are two joint-tenants in fee, and one covenants that after the death of his companion he will stand seised of the moiety of his companion to certain uses, although the covenantor survives, no use shall arise; because at the time of the covenant he could not grant or charge his moiety.

Barton's Ca., 2 Roll. Abr. 790, pl. 9.||

Another reason why the use declared upon the covenant is bad, is this: because the use must be limited by the donor or feoffor; for he must limit the use, who at the time of the limitation had the disposal: now in this case the donor limits the fee to the purchaser, which controls the intent of the covenant.

Cro. Eliz. 401; Noy, 19.

By the same rule it is said, that if the mortgagor, in consideration of so much money paid by J S, covenants, that after redemption he will stand seised to the use of J S and his heirs,(*a*) this is a void covenant: but, if a feoffment be made to A to enfeoff B, to the use of C, and A enfeoff B without the limitation of any use: yet it shall be to the use of C.

Cro. Eliz. 402, Yelverton v. Yelverton; Noy, 1, S. C. (*a*) The reason is, for that at the time of the contract he had no estate or interest.

So, if a man covenant to purchase land by Michaelmas next, and before Easter following to levy a fine to such uses, and accordingly purchase land, and levy a fine, without expressing any use, or without a consideration, notwithstanding the law says it shall be to the use of the conusor, yet it may be averred to be to the uses limited in the first covenant.

Cro. Eliz. 401; Noy, 19. But it is said in Noy, that if another use had been expressed in the fine, that should have controlled the first declaration of the use.

For a man may declare the intent of a future act which he had no power to do at the time of the declaration; for to declare the intent of a future act, doth not suppose an immediate power of doing it; but the do-

ing any act itself, which the law allows to be good and effectual, presupposes the power of doing.

Gilb. Law of Uses, 117.

If a man seised of three acres, makes a lease of one to A for life, and of another to B for life, and of another to C in tail, and then, reciting the several estates, covenants, after all the estates finished, to stand seised to the use of his brother in fee; if A dies, the brother shall have the reversion of that acre immediately, and not expect till the other estates, that is, the other estate for life and the estate-tail, are determined; for it must be construed *secundam subjectam materiam;* and the covenantor hath three distinct reversions in him.

5 Rep. 8 b; Justice Windham's case, Gilb. Law of Uses, 114.

It is a rule, likewise, that a fee cannot be raised by way of purchase to a man's right heirs, for wherever the heir takes by purchase, the ancestor must depart with his whole fee. Thus, A seised in fee had issue two sons, B and C; A covenanted to stand seised to the use of B and the heirs male of his body on M his wife to be begotten; and for want of such issue, to the heirs male of the covenantor; and for want of such issue, to his own right heirs for ever. B had issue of M a son and a daughter; A dies, and then the son dies; the daughter shall not take as heir general, but the uncle, viz. C, shall be taken *per formam doni*, and not by purchase, but by descent.

2 Mod. 207, 211; ‖1 Freem. 225,‖ Southcot v. Stowel.

It is to be observed, likewise, that uses may arise on covenants to stand seised by implication; as,

If a man covenants to stand seised to the use of the heirs male of his body, omitting himself, *per* three justices, but Twisden, J., *contrà*, it is good, and he himself takes by implication: and so judgment was given for the defendant.

Vent. 372, Pibus v. Mitford. ‖See Gilb. on Uses, by Sugden, 119, *notâ*.‖

But, where A made a feoffment to the use of himself for life, and after his death and the death of M his wife, to B his son in tail; it was held in this case, that no implied use did arise to M, and therefore the estate to B was contingent.

Pollex. 94, Carpenter v. Smith.

It has been held, likewise, that a covenant to stand seised to the uses in the indenture, and to no other, cannot exclude uses by implication, but only express uses.

2 Lev. 76, *Arg.* in case of Pibus v. Mitford.

‖A covenant to stand seised is an innocent conveyance, and therefore will not create a discontinuance, or operate as a forfeiture.

Gilbert, by Sugden, p. 258.‖

3. *Of the Nature and Operation of a Bargain and Sale to Uses.*

The nature and effect of this kind of assurance has been already explained;(*a*) and having thus treated of the several sorts of conveyances to uses, we proceed to show—

(*a*) See title *Bargain and Sale*, Vol. ii. p. 1.

β The bargain and payment of the money vests the use; and the statute of uses, the possession.

Russel v. Stinson, 3 Hayw. 5.β

(F) What Kind of Property may be conveyed by way of Use.

ALL lands and inheritances local, as rents *in esse*, advowsons in gross, common for so many beasts, liberties, franchises, visible or local, may be conveyed by way of use.

Sir Wm. Jo. 127, by Dodderidge, J., in Parl. in Lord Willoughby's case.

But inheritances personal, which have no relation to lands or local hereditaments, cannot be conveyed by way of use, as *annuities*.

Sir Wm. Jo. 127, by Dodderidge, J., in Parl. in Lord Willoughby's case.

A seigniory, however, consisting of homage and fealty, the service being merely personal, and to be performed by the person of a man, and resting in feasance, may be granted to a use in respect of the possibility that the tenancy may escheat, which perhaps never will be.

Per Crew, C. J., Sir Wm. Jo. 117, in Lord Willoughby's case.

So, a stewardship or bailiwick in fee-simple of a manor may be granted to a use, being personal offices in point of service.

Per Crew, C. J., Jo. 117, in Ld. Willoughby's case.

So, a liberty of *retorna brevium*, which is personal, consisting in execution of process.

Per Crew, C. J., Jo. 118, in Ld. Willoughby's case, cites it as ruled, 42 Eliz. B. R. in the Countess of Warwick's case.

So, of a shrievalty of a county. And,

Where it is said, that a trust cannot be raised out of a trust, and therefore a bargain and sale by deed indented and enrolled cannot be limited to a use, because a use cannot be limited to a use, yet, notwithstanding, when a man is seised of an estate of an inheritance of an office holden by grand serjeantry, wherein there is required trust in the person, yet a use, which is a pernancy of the profits belonging to that office, may be raised out of the estate of inheritance, otherwise no land holden by grand serjeantry could be transferred to a use, nor any use raised out of the same.

Per Crew, C. J., Jo. 117, in Ld. Willoughby's case. And it is there farther said, that there is a diversity between a mere and a naked trust, wherein he that hath it, hath neither *jus in re*, nor *jus ad rem*, nor remedy by the common law, but only a mere perception of the profits by the permission of the terre-tenant; and an estate of inheritance, wherein the owner hath both *jus in re*, and *jus ad rem*, by the rule of the common law, and for the profit whereof the law giveth the owner remedy by writ of assize, and a *præcipe quod reddat*, as the case requireth; and the confidence required in the person for executing the office may be an objection (though a weak one) that it cannot be transferred over; but that a use, that is, a pernancy of the profits, cannot be raised out of the estate; the trust in the person is no objection at all; for the use respecteth the estate of inheritance, and not the person.

Nothing that passes by way of extinguishment can be granted to a use.

Gilb. Law of Uses, &c., 281.

Neither can a use be raised out of a power.

Arg. Le. 147, pl. 205, in case of Read v. Nash.

Neither can things which are mere rights be conveyed by way of use, as *commons*, *&c.*, *ways in gross*, for a man cannot walk over ground to the use of a third person.

Sir Wm. Jo. 127; Gilb. Law of Uses, 281.

In case the plaintiff declared that the defendant, seised in fee of the lands over which there was a way, and of other lands by indenture of bargain and sale enrolled, conveyed his lands to J S in fee, with a way over his lands, and that J S leased the premises to the plaintiff, and that the defendant disturbed him. The court were all of opinion, that by this bargain

(G) The several Kinds of Uses executed by the Statute, &c.

and sale the land only passed, and not a way over the same, because nothing but the use passed by the deed, and there cannot be the use of a thing which is not *in esse*, as a way, common, &c., newly created, and until they are created no use can be raised by bargain and sale, and, consequently, nothing passed by the indenture.

Cro. Ja. 189, pl. 13, Bewdley v. Brookby; ‖Jones, 127, S. C.‖

A use may be of a lease or chattel.

And. 294, Inglefield's case.

But it is said, that the property of money cannot be changed by a gratuitous delivery to a use. Thus,

A sum of money was delivered to J S, to the use and behoof of a woman, to be delivered to her at the day of her marriage, and before the marriage the bailor revoked it. Two justices held the money countermandable, and two *è contra*. But Dyer says, it seems that the property of the money cannot be changed by the words to the use and behoof.

Ly. 49 a, b, pl. 7, &c., Lyte v. Penny. But if the money had been delivered by way of consideration, satisfaction, or recompense, there the property would alter, and the bailor could not countermand it. Dyer, *loc. citat.*

One seised in fee may bargain and sell, grant and demise land to others and their heirs to the use of one for years, because he has a fee-simple. But lessee for years cannot grant and sell his lease to the use of one for years.

Brownl. 40.

We have thus shown how uses may be raised according to the nature of the respective assurances, and what kind of property may be conveyed by way of use: it remains now therefore more particularly to inquire,

1. What kind of uses are executed by the statute; 2. What cases are out of the statute.

(G) Of the Several Kinds of Uses executed by the Statute,(*a*) which in their more general Division are Twofold, viz.:

1. *Uses* in esse. 2. *Uses in Possibility.*

(*a*) Concerning the execution of Jointures by the latter clauses of the 27 H. 8, c. 10. See title *Dower and Jointure*, Vol. iii.

1. *Uses* in esse.

With regard to uses *in esse*, they are raised either by transmutation of possession, or without such transmutation; and the manner in which they are executed has been already explained in treating of the several sorts of conveyances to uses, and their respective operations. It remains therefore to consider of—

2. *Uses in Possibility; wherein,*

1. Executory Fees. 2. Contingent Remainders.

1. Of Executory Fees.

Though a remainder of a fee cannot, by the rule of law, be limited after a fee-simple, yet that rule hath of late been evaded by distinguishing between an absolute fee-simple and a fee-simple which depends on a contingency; and how such executory fees may be limited, is here to be considered; and they are to be governed by the following rules:

See *antè*, letter (D), p. 127. In what case the statute operates against the rules of law.

(G) The several Kinds of Uses executed by the Statute, &c.

1st, That all limitations that tend to the provision of the family, and to secure against contingencies which are within the party's own immediate prospect, are to be favoured.

Gilb. Law of Uses, 118.

2dly, All limitations that perpetuate, or tend to perpetuity, are in themselves void and repugnant to the policy of the law.

And therefore it is to be seen what is a perpetuity.

Gilb. Law of Uses, 118.

A perpetuity is the settlement of an interest descendible from heir to heir, so that it shall not be in the power of him in whom it is vested to dispose of it, or turn it out of the channel.

Case of Perpet. 31; 1 Rep. 138. ‖ A perpetuity may at this day be described to be such a limitation of property as renders it unalienable beyond the period allowed by law; that is, beyond a life or lives in being, and twenty-one years after, and a few months allowed for gestation. Gilbert by Sugden, 260; and see Sand. on Uses, 196.‖

The inconveniences of which are, that the estate is made incapable of answering the ends for which the perpetuity is maintained and established; for it puts it out of the power of the owner to provide for the necessities of his family, or the extremity and various changes of his own affairs out of the estate; besides, it would be of universal damage to the commonwealth; for it would shut up all converse, by making the way of communication between land and money utterly impracticable. To know, therefore, how far a limitation may be allowed, without the danger of being construed a perpetuity, it is to be considered what limitations are consistent with the rules of reason and policy.

Cas. of Perpet. 31; 1 Rep. 138.

1st, The law in all cases allows the limitations of estates for life, to persons in being; for there can be no danger in such a common limitation, nor any design to perpetuate; and therefore here the party is restrained from alienation farther than for his own life.

Gilb. Law of Uses, 119.

2dly, The law allows of no estate of inheritance, that goes in lineal succession, but what is under the power of that person to whose representatives the estate must descend; and to establish a right of succession, and to restrain the power of alienation, is to perpetuate; and therefore to limit an estate of succession, determinable upon a remote contingency, tends to a perpetuity; since none can purchase, with security, while such a cloud hangs over the estate.

Gilb. Law of Uses, 120. ‖ It is a settled rule, that no executory fees or springing uses can be valid if limited, so as by possibility to take effect at a more remote period than a life or lives in being and twenty-one years afterwards, and a few months allowed for the gestation of a child in the womb; a limit which appears gradually to have become fixed by analogy to the period during which an estate may at common law be prevented from being aliened, by an entail. Stephens v. Stephens, For. 232, reported by name of Steavens v. Steavens; Vivian's MS. Rep. Linc. Inn, Lib. Vol. ii. p. 1; Fearne's Ex. Dev. 430, (7th edit.) Whether, in addition to lives in being, the estate may, by an executory devise or a springing use, be prevented vesting during a term of twenty-one years in gross, independent of the infancy of the devisee, does not appear to be settled. Sir E. Sugden is of opinion that it cannot, and that the period must be confined strictly to the minority of the party to take under the limitation. See his note to Gilbert's Law of Uses, p. 260, and cases there collected. Mr. Sanders considers the contrary rule to be at least settled in practice. Sand. on Uses, 198. And in Beard v. Westcott, 5 Taunt. 393, the Court of Common Pleas seem to have held accordingly. In the same case in B. R., 5 Barn. & Ald. 801, the point was

discussed, but not decided; and see 1 Turn. R. 25, S. C.; Burton's Law of Real Property, p. 251. It is to be lamented that the value of the judgments on the important cases sent from Chancery, is much diminished by the court's habit of not pronouncing judgment at length, or giving any reasons in the certificate.‖

Before we proceed to the application of these principles, it is necessary to observe, that

As to executory fees, there is a difference, where they rise by way of use, and where by way of devise.

1st, If they rise by way of use, there must be a seisin in somebody to be executed in the grantee of the contingent use, whensoever the contingency happens; for if there be not a person that can be seised of a use, there can be no use; and, consequently, there can be no execution of it; therefore if a man covenants to stand seised to the use of himself in fee, till such a marriage takes effect, and then to the use of himself for life, the remainder to his wife, his son, &c., and before the marriage he makes a feoffment in fee, gift in tail, or lease for life, upon good consideration, without notice of the uses, the estates limited after the marriage shall never arise; because there is nobody seised to such uses. And the same law is of feoffments to such contingent uses.(*a*)

Cro. Eliz. 765, Wood v. Reignold; Moor, 731, Strangway v. Newton. ‖(*a*) Sir E. Sugden thinks that such uses cannot be barred, at least where they are limited by a conveyance operating by transmutation of possession, and he cites a MS. of Serjeant Hill to the same effect. Gilbert's Law of Uses, by Sugden, 288.‖

But if in this case he had made a lease for years, he would not have destroyed the future use, but only have bound it; because there is a seisin, out of which the use arises; and at common law, if the feoffees had made a lease upon good consideration, as in this case, it would have bound the lands, and consequently *cestui que use* must have the profits of the land thus leased; and in this case, since the statute, the covenantor has the same power of obliging the fee; and therefore those to whom the contingent estates are limited must take it under the charge.(*b*)

Cro. Ja. 168, Bould v. Winston. ‖(*b*) Serj. Hill says, that if the conveyance is a conveyance to uses, and not a covenant to stand seised, there seems no legal principle to warrant saying that a lease by him who has a qualified use or base fee, should bind the future use. Note Gilb. Law of Uses, 289.‖

So in case of feoffment to the use of A in fee, and if B pays so much, &c., then to B in fee; if A devises his land and dies, it destroys the contingent estate: otherwise it is, if he had devised portions out of the land, for that would not alter the freehold.

Moor, 733, Strangway v. Newton, Gilb. Law of Uses, 126.

A recovery doth not bar an executory fee; for the recoveror, with notice, and without consideration, is seised to the former uses.

Cro. Ja. 592, 593, Pells v. Brown. ‖By three judges against Dodderidge, J. The reasons stated in the text seem immaterial. The ground of the decision was, that he who suffered the recovery had a fee, and the other had but a possibility which could not be touched by the recovery.‖

Secondly, With regard to executory devises.

They have been already treated of under title "DEVISE;"(*c*) yet it may not be improper to take notice of some circumstances more particularly applicable to the title under consideration.

(*c*) See title *Devises*, letters (I) and (K), and *Remainder*, letter (D).

If a man devise lands to A in fee, and upon contingency to B in fee,

and A makes a feoffment in fee, this doth not destroy the contingency; for by a devise the freehold itself is transferred, and there needs no person to be seised to execute an estate in the devisee, as must be where a feoffment is made to executory uses.

Gilb. Law of Uses, 127.

But if a man devise to A for life, with a contingent remainder, if A makes a feoffment in fee, this destroys the contingent remainder, because there is no particular estate to support it.

Gilb. Law of Uses, 127. With regard to executory devises of fee-simple in contingency, after an absolute fee, they stand upon the reason of the old law, which admits favourable distinctions to supply the intent of the testator, that being always to be observed in wills; and where there is such an executory devise, there needs not any particular estate to support it, because the testator did not part with his whole estate in the first limitation, for something still remained in him to give, which accordingly he gave to another, but upon a contingency which might happen upon the first limitation; therefore, because the person who is to take upon him such a contingency, hath not a present, but a future interest, his estate cannot be barred by a common recovery; and that which remained in the testator to give, after the first fee thus limited upon a contingency, shall descend after his death to his heir, till the contingency happens. 2 Nels. Abr. 797.

It remains now to apply the principles above laid down.

1. *With regard to Freeholds.*

The first remainder which was allowed to be good by a devise, after a conditional fee-simple, limited before in the same will, was *anno* 20 Eliz., where the devise was to the son and his heirs, and if he die before twenty-four, and without heirs of his body, remainder over: now this was a plain remainder limited after a fee-simple to the son, but not upon his dying without heirs of his body generally, for that had been too remote an expectancy; but it was upon his dying without heirs of his body before he was twenty-four years old; so that it being a remainder to arise upon a contingency, which might happen in a few years, it was adjudged good; but the son living many years after he was twenty-four years old, this contingency never happened; and therefore it was adjudged he had an estate in fee, and not in tail.

3 Leon. 64; Hind v. Lyons, Dyer, 124, pl. 38.

But there can be no executory devise of a fee-simple, after an estate-tail; because that would tend to a perpetuity; therefore the first limitation must always be in fee; as, for instance, the father having two daughters, devised a house to the eldest and her heirs, and another house to the youngest and her heirs, and if the youngest died before she was sixteen, living the eldest, then the house to the eldest and her heirs; and if both his daughters died without issue, then both the houses to his grand-daughters and their heirs. Adjudged, that this last clause, viz., if both his daughters died without issue, did not make cross remainders to them in tail by implication; but that each of them had a fee-simple conditionally, immediately, viz., the eldest if she survived, her sister dying before she was sixteen, and the youngest, if she outlived that age; that the estate-tail was not vested in the eldest but upon a contingency, viz., if the youngest daughter had died before she was sixteen, which contingency never happened, because the youngest daughter outlived that age; and then this case was no more than a devise of a house to the youngest daughter and her heirs; and if she die before she was sixteen, living the eldest, then to

her and her heirs; which is a remainder in fee limited, after a conditional fee; and good by way of executory devise.

Dyer, 330, pl. 20; 2 Nels. Abr. 797.

Nevertheless, we meet with some contrary resolutions as to this point, till at length the law seems to have been settled by the following case, viz.: the father devised his lands to his youngest son and his heirs; and if he died without issue, living the eldest, then to him and his heirs; afterwards the youngest son, imagining he had an estate-tail by these words, "*if he died without* issue," suffered a common recovery, and sold the lands, and died without issue, his *eldest brother being still living;* and the question was, whether he had a good title or not against the purchaser? It was adjudged for him, that he had a good title, because the youngest son had neither an estate-tail, nor an absolute fee-simple, but a conditional fee; for the devise to him and his heirs, and if he die without issue, is not absolute and indefinite, but it is tied up to a contingency of his dying whilst his eldest brother was living; now he being living when the youngest brother died, the fee-simple determined by his death without issue, and immediately arose in the eldest brother, who had the remainder in fee, depending upon the possibility that he might be alive when his youngest brother died without issue, which remainder did not depend upon any particular limitation, but upon a collateral determination of the estate of the youngest son dying without issue whilst he was living; and because it was a remainder not in being when the recovery was suffered, nor until the said contingency did happen, therefore it could not be barred by that recovery.

Godb. 282, Pells v. Brown; Cro. Ja. 590, S. C. But if an estate be limited to J S, in fee, while J N hath issue, remainder to J D, this is void to J D, for this comes within the danger of a perpetuity, and doth not determine within the common compass of an estate for life. Vaugh. 272, Gardner v. Sheldon.

So, where there was a devise to T P and his heirs, and if he die without issue, living W C, or if he die before he is of the age of twenty-one years, remainder over to another in fee; it was adjudged, that this was a conditional fee in T P immediately, and that the words "if he die without issue" make an estate-tail if he had gone no farther; but it is dying without issue, *living W C*, so that though it was an estate-tail, it was not to vest in T P but upon that contingency; so that there is a plain difference, where the limitation is upon a dying without issue generally, and a dying without issue in the lifetime of another; for in the first case there can be no executory devise after an estate-tail, because that would tend to a perpetuity; for that contingency is too remote, where a man must expect a fee upon another's dying without issue generally; but dying without issue living another, may happen in a little time, because it depends but upon one life; and therefore a devise of a fee-simple to one, but to remain to another upon such a contingency, is now held good by way of executory devise; but not upon a dying without issue generally; as for instance, the father devised lands to his eldest son and his heirs, and other lands to his youngest son and his heirs; and that if either of them died without issue, the survivor should be heir to the other: adjudged, this was an estate-tail in them, because it is limited to them upon their dying without issue generally.

Nels. Abr. 798; Cro. Ja. 695, Chadock v. Cowley.

||The difficulty in most cases of this sort is, to ascertain from the whole

context of the will, whether the gift over is generally upon failure of heirs, which is void, unless where the preceding estate can be cut down to an estate-tail; Wood v. Baron, 1 East, 259; Doe v. Ellis, 9 East R. 382; or whether it is confined to a failure of heirs within the period allowed by law, in which case it is good.

Where the devise over was "in case the first devisee should happen to die leaving no issue *behind him*," the two last words were held to tie up the event to the time of the devisee's death; and, consequently, the devise was held good.

Porter v. Bradley, 3 Term R. 143.

So, also, where the devise was to A and his heirs for ever, and in case he should *depart* this life, *and leave no issue*, then over: this was held a good devise, since the words implied a dying without issue at the time of the death of the first devisee.

Roe v. Jeffery, 7 Term R. 589.

So, where the bequest of a term was to A and the heirs of his body, and to their heirs and assigns for ever, but in default of such issue, then after his decease to B and his heirs, the limitation over to B was held good by way of executory devise.

Wilkinson v. South, 7 Term R. 555; and see 2 Bos. & Pul. 324; 2 Marsh. R. 161.

So, where there was a devise to A B, her heirs, &c., for ever; and in case A B happen to die and leave no child or children, then to C D and her heirs for ever, paying the sum of 1000*l.* to the executors of A B, or to such persons as A B should by will appoint; it was held that the devise over to C D was a good executory devise, in case A B died leaving no issue living at her death, the payment of the 1000*l.* to the executor of A B, being considered to indicate that the estate was meant to go over on failure of children at A B's death, and not on the remote event of an indefinite failure of issue.

Doe v. Webber, 1 Barn. & Ald. 713.

So, where a testator having a son and daughter, and the latter having several children, devised to his son W F in fee, and if he should leave no children, child, or issue, the estate was, on the decease of W F, to become the property of the heir at law, subject to such legacies as W F might leave to the younger branches of the family; it was held, that W F took an estate in fee with an executory devise over to the person who should be heir at law on the death of W F without leaving any issue.

Doe v. Frost, 3 Barn. & A. 546; and see 4 Maule & S. 61.

The words "leaving no issue," when standing alone, and not explained by any words in the context of the will, are held to mean indefinite failure of issue, when applied to a freehold estate; but in case of a bequest of a chattel interest, these words are considered as referring to a failure of issue at the death of the party; the reason of the difference being, that in the former case the courts lean in favour of the heir at law, whose interest is concerned.

Forth v. Chapman, 1 P. Wil. 664; Porter v. Bradley, 3 Term R. 143; Daintry v. Daintry, 6 Term R. 307; Crooke v. De Vandes, 9 Ves. 197; Fearne Ex. Dev. 471, 477, (7th edit.)‖

2. *With respect to Chattels.*

Not long after a fee-simple was adjudged to arise to one, after a contingent fee limited to another, it became a question, whether a term for years

(G) The several Kinds of Uses executed by the Statute, &c.

might be limited in the same manner; and it was objected that it could not, because it being no more than a chattel, it was so poor and mean an interest, that it could not be limited over in remainder; for by the rules of law, the devise of a chattel for an hour, is a devise of it for ever. Now in answer to the poverty and meanness of a chattel interest, it is certain, there is no material difference between it and an inheritance, in respect to the owner of the lands himself, but only in respect of the duration of his estate; for the proprietor of a lease for years hath as absolute a power over it, as the owner of an inheritance hath over that estate, and since great part of the lands in this nation is held under leases, it seems very absurd, for any one to affirm that such lessees cannot provide for the contingencies of their families, because their estates and interest in such lands are accounted poor and mean in law, being compared to those who held in fee-simple absolutely.

2 Nels. Abr. 801; Ld. Not. Arg. Cas. of Perp. 32, 33.

It is true, this reason hath prevailed; for formerly, wherever there was a devise of a term of years to one, and that if he die, living another person, (particularly named in the will,) that it should remain to the other person, during the residue of the term, such a remainder was held void.

Dyer, 74, pl. 18.

But about the beginning of the reign of Queen Elizabeth, the judges were of another opinion; for there being a devise of a term for years to one for so long a time as he should live, remainder over to another; this was adjudged good. At length it was adjudged, that a remainder of a term to one, after it was limited to another for life, was good, viz., the testator being possessed of a term for sixty years devised, that his wife should have all his lands in lease for so many years as she should live, and that after her death, the residue thereof should be to his son and his assigns, and made her sole executrix, and died: this remainder was adjudged good upon this distinction, viz., that there was *jus possessionis* and *jus proprietatis* of a term for years; that it might be collected out of the words of this will, that the testator did not intend the absolute property of it to his wife, but only the possession for so many years as she should live, though it is true there was a possibility she might survive the whole term, but that it is plain he intended the right and property of the residue of the term to his son. And this my Lord Nottingham tells us, in the Duke of Norfolk's case, was the first time that an executory remainder of a term for years was adjudged good.

Dyer, 277, pl. 59; Dyer, 358, pl. 50; 4 Leon. 192; Ld. Not. Arg. Cas. of Perp. 33.

Afterwards some distinctions were made, where the devise was of the occupation and profits of the land, &c., in lease, and where the devise was of the lease or term itself; but these distinctions were set aside in the following case. Where a lessee for years of a farm devised the use and occupation thereof to his wife for life, and after her decease to his son Matthew Manning, for the residue of the term, and made her sole executrix, and died: it is true one judge was of opinion, that the residue of the term thus devised to the son was void, because his mother had the whole by the devise to her for life, and there being only a possibility that she might die before the term expired, the residue could not be devised over to another, to vest in him upon such a possibility; but adjudged, that Matthew Manning the son did not take this term by way of remainder,

but by way of an executory devise to him, viz., upon the contingency of his mother's death within the term: and that there was no difference where the devise is of the lease itself, or of the land, or farm in lease, or of the use, occupation, or profits of the land, for the law will make such construction of those words, as may consist with the intent of the testator.

8 Rep. 94, Matthew Manning's case. But a grant of the lease for years to J S for life, remainder to J N, is not good to J N, for leases for years being under the power of the freeholder, they are recovered as chattels, and go to the executors; and a chattel cannot be limited for life with a remainder over; because this would create great insecurity in common traffic. Gilb. Law of Uses, 121. ‖But they may at this day, by deed of trust, be as effectually settled to one for life, with remainder over, as an estate of inheritance, if it is not attempted to render them unalienable beyond the period allowed by law. Harg. Co. Lit. 20 a, note.‖

The law seems to be now settled, that executory devises are good, provided the contingency is to happen within a life, or several lives,(*a*) so that they are all in being; for there can be no tendency to a perpetuity, which was one great mischief apprehended from those kinds of limitations.

1 Vol. Cas. in Eq. Ab. 191. (*a*) If there are ever so many lives, there must be a survivor, so that in effect it is but the length of one life. 2 Vol. Cas. in Eq. Abr. 337; ‖Woodford v. Thellusson, 1 New R. 357.‖

As the legal estate of a term may be devised, so the trust of a term may be limited; the trust of a term in equity being governed by the same rules which govern the devise of a term at law.

Gilb. Law of Uses, 124; 1 Vern. 235, Massenburgh v. Ash.

A limitation of a term to years for twenty distinct persons *in esse* is good,(*b*) as has been said; but the limitation of a term to A for life, the remainder to the right heirs of B, a person *in esse*, is a void remainder; and after the death of A it shall revert to the donor; because this might tend to the establishment of an estate of inheritance in a chattel, and putting it out of the course the law had settled for it, whereby it ought to go to the personal representative.

Gilb. Law of Uses, 124; Chan. Cas. 8, Goring v. Bickerstaff. ‖(*b*) It seems now settled that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect if at all within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But where once any preceding executory limitation, which carries the whole interest, happens to take place, that instant all the subsequent limitations become void, and the whole interest is then become vested. See Fearne's Ex. Dev. p. 415; Gilb. by Sugden, p. 282, and cases there cited.‖

So, if a term be limited to A for life, the remainder is in the donor; and if a term be limited to A for life, the remainder to the right heirs of the donor, this is a void limitation, because the reversion is in him.

Gilb. Law of Uses, 124.

But, if the trust of a term be limited to A for life, the remainder to B, B may dispose of the remainder; yet, if a term be devised to A for life, the remainder to B, B cannot dispose of this remainder; for by the rules of the common law, a possibility cannot be granted over, for a man that only may have a right, has at present no right in him; and while the rules of law say he has no right, it is contradictory and repugnant to allow him to act as a person having right, by transferring an interest to another. B, in this case, has only a possibility to have a right, because the estate of A, being of uncertain duration, may outlast the term for years; but in Chancery, where the trust is examined, they allow a man to provide for his pre-

sent occasions out of what he may possibly have; and a purchaser of it shall not lose the probable advantage, since he hath given for it a valuable consideration.

Gilb. Law of Uses, 124; 4 Rep. 66, Fulwood's case.

2. Of contingent Remainders.

The law respecting this title has, in part, been already explained;(*a*) it may be necessary, however, more particularly to consider,

(*a*) See title *Remainder*, letter (D), *et sequent.*

1. *In what Manner they are to be executed.*

If a feoffment be made to J S in fee, to the use of A for life, remainder to his first, second, and third son, the remainder to B in fee, from these limitations the three following observations may be drawn:

Gilb. Law of Uses, 127.

1st, That there ought to be a person seised to the use at the time when the use is executed; and this is plain by the words of the statute, viz., *if any person stand or be seised.*

1 Rep. 126, a, Chudleigh's case. ‖ Anderson's report of this case seems the best; and see an abstract of a translation of it, Sugden's Gilbert on Uses, App.; and see the notes to the case in 1 Rep. (Ed. Thomas and Fraser.)‖

2dly, That the estate for life is immediately executed in A with the remainder in fee to B by the statute; because the use is immediately in them, and they have the possession in the same manner they have the use.

Poph. 74.

3dly, That no possession can be immediately executed in the sons, because they are not in being: and therefore capable of no property, neither in use nor possession.

1 Rep. 126 a; Poph. 72; 1 Rep. 136 a.

The inattention to these particulars caused two false opinions in this matter in the debate of Chudley's case.

1st, Some thought, according to the second rule, that the whole possession must be executed in A and B, and therefore the contingent use, when it falls, was executed out of the first livery; and the estate formerly in the feoffees; and this by the words of the statute declaring that the estate that was in the feoffee shall be in *cestui que use;* and hence they inferred, that since the estate was executed by the power of the statute, it must be preserved till such execution by the same power; and therefore they said, the contingent remainders were in *abeyance*, and not extinguishable by the alienation of tenant for life.

Poph. 73; 1 Rep. 132, 133, 134.

But this is a mistake; first, because this is contrary to the first rule; for that supposes an estate in J S at the time of the execution.

1 Rep. 136 a; 1 And. 332.

2dly, Because it is contrary to the nature of an abeyance by the rules of law; for if there be tenant for life, remainder to the right heirs of J S living, if tenant for life dies, or aliens, during the life of J S, the remainder is destroyed.

1 Rep. 135.

3dly, Because it would create a perpetuity.

Gilb. Law of Uses, 129.

Some add another consequence of this doctrine, that a use would rise out of a use.

Gilb. Law of Uses, 129.

Others held a different opinion; and they thought there was an immediate remainder vested in J S to serve the contingent use when it falls, and that this estate was determinable upon the rising and execution of the estate in the sons, &c.

Gilb. Law of Uses, 129; 1 Rep. 128, 129.

But this could not be; first, because this is contrary to the second rule; for thereby an estate is immediately vested in A and B, but by this opinion, the estate in B is only executory; for it arises to him upon the same contingency that the estate of J S rises, for he could not have a fee before; for then there would be a double fee.

Gilb. Law of Uses, 129; 1 Rep. 128, 129.

2dly, Because J S would have a remainder without any grantor, and the law leaves it to parties to limit their own estates; and where nobody has limited an estate, there can be no legal limitation.

Gilb. Law of Uses, 129; 1 Rep. 128, 129.

3dly, If a remainder be vested in J S he must punish waste, and enter for a forfeiture; but the party designed him no such benefit, but made him only an instrument to convey it to others.

Gilb. Law of Uses, 129; 1 Rep. 128, 129.

The true opinion is, that the legal estate is executed in A and B, but the contingent remainders are not utterly lost, because the possession by the statute must be executed in the same manner as the use is limited; therefore there remains a possibility of possession by the feoffees, to this purpose only, that when the contingency happens, then the possession may be transferred to the remainder-man; and if this is an estate not known before, and so has no determination at common law, yet it is such an one as must be raised by the intent of the statute, and all its ends could not be answered without it; and therefore to suppose, as in the other opinions, no estate in the feoffees, or to reduce it to the standard and rules of the common law, is equally false and impracticable.

Gilb. Law of Uses, 130, 131. ‖ As to the much controverted question on the mode in which the statute executes contingent uses, whether by means of a *scintilla juris* in the feoffees, or by transferring the whole seisin to the vested uses, and letting in the contingent uses when they arise, see Gilb. on Uses, by Sugden, note, p. 296; Sanders on Uses, 232; Sugden on Powers, 11, 45, where the cases are analyzed; Rowe's *Scintilla Juris*, Co. Lit. Butler's note, 271 b; Butler's Fearne, 291. The question seems now unimportant in practice.‖

2. *How they may be defeated.*

1. Where there is no Power of Revocation.

How they may be defeated, where there is no power of revocation has been already explained;(*a*) it may not be improper, however, to take notice of the following distinctions.

(*a*) See title *Remainder*, letter (G).

If a man covenants for a good consideration to stand seised to the use of his son for life, the remainder to such feme as the son afterwards shall take to wife, for her life, with remainder over, and after the covenantor makes lease for years of the land, reserving certain rent, and after the son

takes a wife and dies; this lease for years is a revocation and destruction of the contingent use for so much of the time as the lease is to continue; for the estate of the land is disturbed before the contingent happened; but this is not any revocation for more than the lease, for the feme shall have the reversion, and the rent reserved upon the lease.

2 Roll. Abr. 793, Bould v. Wiston; Noy, 122; ‖Cro. Ja. 168.‖ Gilb. Law of Uses, &c., 138, cites S. C. and says, that this will not prevent the raising of the contingent remainder, nor bind it; for the covenantor has no power to demise anything but the reversion, and consequently the freehold remains unaltered to support the contingent remainder. But he adds, that if the covenantor in this case had reserved to himself a power of making leases, this lease would have been good, and a revocation of the former uses. ‖Vide *suprà*, Vol. viii. p. 357, S. C.‖

If A, seised in fee, in consideration of natural love and affection to his wife and children, covenants with B to stand seised thereof to the use of himself for life, and after to the use of his wife for life, and after to the use of C his daughter for life, and after to the first son of the body of C begotten, and so after to the other sons of C in tail, and after to his own right heirs, and after A, by indenture between him and F reciting the said conveyance and estates, grants his said reversion in fee without any consideration to F and his heirs, to the use of F and his heirs; this grant of the reversion in fee to F is not any destruction of the contingent use limited to the first son of C, but that the use of the first son of C born after this grant, and in the life of A or C, shall arise well enough, because by the grant of F of the reversion, the first uses and estates being recited in the deed of grant, and this being without any consideration, the grantee shall stand seised to the first uses, inasmuch as he has conusance of the first uses; and though he limits it to the use of the grantee and his heirs, yet this does not alter the trust any more now than at the common law.

2 Roll. Abr. 796. This was upon a conveyance made by Sir Edward Coke. 2 Sid. 64, 129, 157, Heyns v. Villars. Gilb. Law of Uses, 136, cites S. C. and says, that this doth not destroy the contingent remainder to the son of C for life, who had a right of entry for the forfeiture, and a particular estate in right, on which the contingent remainder will depend. ‖Vide *suprà*, Vol. viii. p. 346, S. C.; Gilb. on Uses, by Sugden, 395, *notâ*.‖

But, if in this case the wife had entered after the husband's death, this would not only have revived her estate, but the estate of C and the contingent remainder thereon, which had never been put out of being; otherwise it is, as is said, in Sampson Shelton's case, if the contingent remainder had depended upon the estate of B.

Gilb. Law of Uses, 136. ‖The reason of this is not very obvious: the rule is, that a right of entry to support a contingent remainder must be a present right; a mere future right, arising at the same instant with the contingent remainder, will not be effectual. Now in this case the feoffment of the husband passed his estate and the estate of the wife during the coverture; so that no right of entry existed during the marriage; and the wife's right, which would not take effect till after the coverture, when the contingent remainder itself was to vest, would not support it; and see Bigot v. Smith, Cro. Car. 102; Thompson v. Leach, 1 Ld. Raym. 316; Fearne's C. R. 369, 370; Gilb. on Uses, by Sugden, 309, *notâ*.‖

If a feme covert or an infant be enfeoffed to any use precedent since the statute, the infant or baron comes too late to discharge or root up the feoffment; but, if an infant be enfeoffed to the use of himself and his heirs, and if J D pay such a sum of money to the use of J G and his heirs, the infant may disagree and overthrow the contingent use.

Lord Bacon's Readings on the Statute of Uses, 348.

But it is otherwise, if an infant be enfeoffed to the use of himself for

life, the remainder to the use of J S and his heirs, for he may disagree to the feoffment as to his own estate, but not to divest the remainder, but it shall remain to the benefit of him in remainder.

Lord Bacon's Readings on the Statute of Uses, 348.

2. Where there is an express Power of Revocation.

A feoffment or fine, &c., with power of revocation, is void at common law, as to all power of revocation; for the words of enfeoffing or granting, &c., transfer the whole right, property, and power of disposal to the feoffee, &c.; and therefore for the party to limit to himself a power of revocation and disposal, is repugnant to the force of the precedent words, and would introduce a double power seated in distinct persons over the same thing, which the common law disallows. But this rule of law was set aside by the same construction that hath brought in executory fees; for when, before the statute, uses were limited with power to revoke, as the occasion, circumstances, and mind of the party altered, it was thought reasonable that the parties should have liberty to revoke according to their own apparent intent, by which uses are ever governed; and since the possession is executed by the statute as the party had the use, the estate continues revocable.

1 Inst. 237; Gilb. Law of Uses, 141.

A power of *revocation* is twofold:

1. A power relating to the land.
2. A power simply *collateral* to the land.

Hard. 415, *per* Hale, Edwards v. Slater; ‖ Sugden on Pow. 46, (4th edit.)‖

1st, A power relating to the land is, where a power is limited to one that had, hath, or shall have an estate or interest in the land.

This is again twofold:

1. *Appendant* or *annexed* to the estate in the land.
2. In *gross*.

Hard. 414; Gilb. Law of Uses, 141.

1st, Appendant or annexed to the estate in the land, is, when a man hath an estate in the land, and a power of revocation, and the execution of the power falls within the compass of the estate in the lands; as if the tenant for life with power to make leases, or to revoke, grants a rent-charge, and then makes a lease according to his power, the lessee shall hold it charged during the life of the tenant for life; for he hath power to charge his own interest, which by his own act cannot be avoided.

Hard. 414; Gilb. Law of Uses, 141.

And if in this case he covenants to stand seised to the use of a stranger, he cannot, by any after act, revoke the uses; for since, as is said, the execution of this power falls within the compass of the estate, so that, unless it be executed during the continuance of the estate, it can never be executed; therefore, whatever act passes away the estate, hinders the execution of this power of demising; for a man cannot demise that estate which he hath passed away to another.

2dly, In gross is, where a man hath an estate and power of revocation, and the execution of the power falls out of the compass of the estate; as, if there be a tenant for life, remainder in tail, with a power lodged in tenant for life to make a lease for thirty-one years to commence after his death, to

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raise portions to his daughters, this is a power in gross; and if tenant for life bargains and sells the lands in fee, this doth not destroy the power: for since the execution of the power doth not fall within the compass of his own estate, the selling of his own estate only doth not hinder the making use of the power.

Hard. 414; Gilb. Law of Uses, 141.

But, if he had levied a fine, or made a feoffment in fee, this power had been destroyed, for here he absolutely passes the entire estate, and devests all the remainders; and thus, by passing the whole estate to another, and limiting new uses to his own benefit, he hath destroyed all the powers of revocation; for this power cannot be executed but out of the remainders; and he hath prevented the execution of it by having already disposed of the whole estate to another.

Hard. 416.

He may likewise release such a power of revocation to the remainderman; for he that is to have an interest by any possibility may release the same to the present possessor, as well as if he had a future right, for it is according to the policy of the law, for the quiet and peace of the possessors.

Hard. 416; and see 10 Rep. 48, Lampet's case; Gilb. Law of Uses, 143.

2dly, Where the power of revocation is simply collateral.

Hard. 415.

And that is, where a man hath no present interest in the land, and by the revocation of the estate is to have nothing.

Gilb. Law of Uses, 144.

In this case, a fine or feoffment of the land is no extinguishing of the party's power; for though every man is estopped to claim an interest contrary to his own act, whereby he passes an estate to another, yet, if a man makes a feoffment, or levies a fine, and then revokes, whereby a stranger claims an interest, the stranger, who is the only person that can claim, is not estopped to claim it, for no man is estopped from demanding his own right by the act of another; and if there be no estoppel in this case, the stranger hath a right by the contract.

Gilb. Law of Uses, 144; 1 Rep. 174, Digge's case.

It remains lastly to consider of the manner of *revocation*.

1st, If a covenantor is tenant for life, having a power of revocation, upon revoking he is seised of his former estate, without entry or claim; for he is in possession already; and therefore there can be no entry, and the claim where the party is already in possession is a void solemnity; for it doth not make any change of property notorious.

1 Inst. 237; 1 Rep. 173, 174, Digge's case; ‖15 H. 7, fo. 11 b; and see a translation of the case, Sugden on Powers, Append. No. I.‖

2dly, If there be a tenant for life, with a power to revoke the remainders, and limit new ones, he may do both by the same conveyance.

1 Inst. 237; 1 Rep. 173, 174, Digge's case.

For since upon revocation the former uses are void *ipso facto*, without any solemnity, there is nothing to hinder why the same conveyance should not create new ones, and the law, to support the contract, would suppose the destruction of the ancient uses to precede the creation of the new uses.

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[But, where a revoker limits new uses, not being expressly warranted by his power so to do, or, if warranted, then not exactly pursuant to the terms of the power, such uses cannot inure upon the original conveyance, but must take effect out of his interest; they must, consequently, be limited on a *new grant*, or by *covenant* upon a consideration expressed; the consideration of the original uses not extending to the new uses limited upon the revocation.

Powell on Powers, 281.

R B, having issue only one daughter married to E, levied a fine, and by indenture declared the uses to R B and his heirs male, remainder to several of his brothers, and the heirs male of their bodies, remainder to the said daughter, &c. In the indenture there was a *power* of revocation of those uses, and also a power to declare new uses. An indenture was made accordingly, revoking the first uses, in which also there was a power of revocation, but no power to limit new uses. Then another indenture of revocation, and also declaring new uses, was made; which indenture contained a clause, that all other fines afterwards to be levied should inure to those uses. Upon this case it was argued, and also agreed by the court, that if an indenture declared the uses of a fine, and further that it should be lawful to revoke, &c., and also to limit new uses, &c., the party might, by such deed, revoke and limit new uses as often as he pleased, and all the estates should arise out of the fine. But if upon any such indenture, wherein he declared new uses and reserved power of revocation, he omitted *expressly* to reserve a power to limit new uses, he could then only revoke, and could not limit new uses by virtue of the estate raised by the first fine. And thereupon the counsel, in support of the last indenture, showed another fine levied the term after the date thereof, by which it was agreed that the estates limited by the last indenture were well raised.

Ward v. Lenthal, 1 Sid. 343; ‖Sugden on Pow. 325; Gilb. on Uses, by Sugden, 320.‖

‖If a power require the deed of revocation and limitation of new uses to contain a power to revoke by deed, yet on the execution of such reserved power of revocation the donee need not reserve another power to revoke.

Phillips v. Phipps, Sugden on Pow. 325, (4th ed.)‖

A suffered a recovery to the use of himself for life, remainder to B in tail, remainder to C in tail, remainder to D in tail, remainder to A in fee, with power to revoke the three remainders in tail by any writing under his hand and seal. He revoked them within the terms of the power, and, by the same deed, declared new uses in favour of the plaintiff without any words of conveyance, covenant to stand seised, or consideration expressed. The question was, Whether this new declaration of uses was good or not? It was insisted in support of it, that A, having revoked the intermediate remainders, had the whole fee in himself, and might dispose of it as he pleased: and whether it was by the same deed or a different deed was not material. But it was answered, and resolved by the court, that true it was, he might by will, or any new conveyance, have made such new disposition, and even this deed would have been sufficient for such purpose, if there had been a *new grant*, or a *new covenant* on consideration expressed: but, here, he had declared new uses as under the recovery; whereas the uses of the recovery were full before, and the power was only to revoke and not to declare new uses.

Anon., 1 Stra. 584.]

3dly, He may revoke part at one time, and part at another; for this is not entire, like a condition, for a condition is entire, because the estate must be defeated in the same manner that it is made; for otherwise the solemnity of the entry will not be equivalent to the solemnity of livery; but a revocation is in the nature of a limitation, and there is no solemnity necessary to the defeating of the estate: and therefore it may be done by parts; consequently, if a fine be levied of part, that is a revocation only of that part.

1 Inst. 215 a, 237 a; Gilb. Law of Uses, 145.

[He may revoke too conditionally. Thus, where A, seised in fee, made a settlement of the estates in question, with power of revocation, and seven years afterwards mortgaged the same in fee to one of the remaindermen in the settlement, and the condition of the redemption was, that, if the mortgagor or his heirs paid the money at the day, he should have the lands in his former estate; the question was, Whether this mortgage was a total revocation, or only *pro tanto*? The Lord Keeper declared, that it was a revocation *pro tanto* only, the mortgagor being to have the lands on payment, as in his former estate; and it was decreed accordingly.

Thorne v. Thorne, 1 Vern. 141, 182; Perkins v. Walker, Ibid. 97.

But, Sir Joseph Jekyll, in giving his opinion in the case of Fitzgerald and Lord Fauconberge, said, that he knew of no case but that of a mortgage, wherein equity controlled a power of revocation; and the reason of that case was, because the mortgagor in *equity* continued to be still owner of the estate, it being considered there but as a pledge for the money. And the decision in that case seems to go a great way in support of the opinion.

Powell on Pow. 265.

There, F, being unmarried, and having no child, and being seised of estates of large annual value, did by lease and release, dated the 2d and 3d of July, 1712, as well for settling the said premises in his name and blood, to the several uses, trusts, and purposes, and in such manner as thereinafter limited, "with liberty nevertheless, to and for him the said F, freely and clearly at his will and pleasure, to dispose of, charge, or alienate the said premises, or any part thereof, for any estate or estates whatsoever, as he should think fit; and to revoke, recall, and make void all and every the use and uses, trusts, limitations, and appointments thereby raised, limited, and appointed, mentioned, and declared concerning the same, as also in consideration of 5*s*., convey to trustees and their heirs all the estates, to the use of himself for life, with remainders over." There was also a term created, among other things, by sale, mortgage, or demise thereof, for the term, or any part thereof, to raise all such sums as F should owe at his decease, and also all such sums as he, by his last will, or any other deed or writing executed under his hand and seal, in the presence of two or more witnesses, should give and appoint to be paid, or charge the premises with, to any person or persons whatsoever: but, if the person next in remainder expectant on the term should pay all the said debts, annuities, and moneys so to be devised or appointed, then the term was to cease. Then followed these provisoes: first, "A proviso or power for the said F, from time to time, by any deed or writing under his hand and seal, to be signed and duly sealed and delivered in the presence of two or more witnesses, to demise, lease, limit, or appoint the said premises, or any of

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them, to any person or persons whatsoever for any term or terms whatsoever, for so much yearly rent as the said F should think fit, and with such other conditions and agreements as the said F should please." Secondly, "A proviso, that if any female, who, according to the limitations, ought to inherit the premises, should marry any person without the consent of the trustees, or should marry any person that should be a protestant, and not of the communion of the church of Rome; that then, and immediately after such marriage, all the estates before created and appointed for the benefit of such person so marrying should cease and be void." Thirdly, a proviso, "That it should and might be lawful to and for the said F, at any time or times during his natural life, at his will and pleasure, to grant, sell, or demise, the thereby granted premises, or any part thereof; or by any deed or writing under his hand and seal, or by his last will and testament in writing, signed, sealed, delivered, and published, in the presence of three or more credible witnesses, to revoke, repeal, and make void, all, every, or any of the use and uses, estate and estates, trusts, and limitations before raised, created, limited or appointed; and to declare and limit the same, or such other new uses as should seem most meet and convenient to the said F; and then and from thenceforth the estates and uses before limited and appointed, and so revoked and repealed, to cease and determine and be utterly void, as if the same had never been made, limited, and appointed; and that the said F should and might dispose of the said premises, and every part and parcel thereof, to such other person and persons, use and uses, as he should think fit, any thing before mentioned to the contrary in anywise notwithstanding."

Fitzgerald et al. v. Lord Fauconberge et al., 3 Bro. Parl. Ca. 543; S. C., Fitzgib. 207.

By other indentures of lease and release, dated the 25th and 26th of September, 1715, made between F of the one part, and T and W of the other, reciting, that F stood indebted to several persons named in a schedule thereunto annexed in the several sums therein mentioned; he, as well for securing the said debts, and more speedy payment thereof, and in consideration of 5*s*., as also for other good causes, conveyed to *T and W and their heirs*, *the premises*, upon trust that they or the survivor of them, &c., should, *out of the rents and profits of the premises*, *or by mortgage*, *&c.*, *raise so much money as should be sufficient to pay all the debts mentioned in the* said schedule, with interest, *over and above the several annuities*, *rents*, *and rent charges in the said schedule mentioned*, wherewith the said premises stood charged, and pay the same in full discharge of the said debts and interest; and, after payment thereof and their own charges being satisfied, that "they should pay the overplus thereof, (if any,) *and reconvey such part of the premises as should remain unsold*, to the said F, or to such person and persons, and to such use and uses, estate and estates, as the said F should by any deed or writing under his hand and seal, attested by two or more credible witnesses, limit, direct, and appoint the same." This indenture was attested only by two witnesses, and remained in the custody of W, the trustee, till his death.

Then, by indenture dated the 26th of September, 1715, executed by all the said three parties, reciting the lease and release of the 25th and 26th of September, 1715, it was declared, that it should and might be lawful for the said F, at any time or times thereafter during his life, at his will and pleasure, by any deed or writing under his hand and seal, attested by two or more witnesses, or by his last will in writing, attested by three or more

witnesses, to revoke, repeal, and make void, all or any of the trusts and estates in the said indenture of release of the 26th September, 1715, raised, created, limited, and appointed of the said premises, and every part thereof; and to declare, limit, and appoint the same to such other use and uses as should seem most meet and convenient to him; and that, from thenceforth, the trusts and estates so revoked and repealed, should cease and be void, as if the same had never been created, limited, or appointed; and that it should and might be lawful for the said F to dispose of the same premises, or any part thereof, to such other person and persons, use and uses, as he should think fit.

F died on the 24th of January, 1716, having made no appointment or disposition of the estate after the execution of the *deeds* of 1715.

And, upon these several instruments, a question arose between the heir at law of F and the claimants under the settlement of 1712, whether the deed of September, 1715, for securing the creditors of F was not a revocation of the settlement of 1712, pursuant to *some* or *one* of the provisoes therein contained. It was contended on the part of the claimants under the settlement of 1712, that if these deeds of 1715 were deemed to be a revocation of that settlement, (which upon other grounds it was argued they could not be,) yet they could not be a total revocation; because it was admitted, that those deeds operated *only* as an implied revocation, by reason of their inconsistency with the settlement of 1712; and, therefore, were no further a revocation than such inconsistency extended: then, the release having conveyed the premises in trust to raise money for paying the debts mentioned in a schedule thereunto annexed, and afterwards to reconvey to F, or such persons or uses as he should appoint, without saying to F or his heirs, or limiting the estate in default of appointment, which was the case that had happened, it was apprehended that the release of 1715 was no further inconsistent with the settlement of 1712, than as to the particular uses specified in that deed, and, consequently, as to the rest of the estate, did not revoke the settlement of 1712; and that, under those circumstances, a court of equity ought to restrain it from operating any further than to satisfy the particular purpose. It was argued on the other side as to this point, that F, having, by the deeds of 1715, conveyed the fee and inheritance of the whole estate to T and W upon trusts and for uses utterly inconsistent with those of the settlement of 1712, this latter conveyance must, consequently, be a *complete* revocation of the former; the legal estate being vested in new trustees, who could be seised thereof upon no other trusts than the new ones, and F having made no subsequent appointment of such part as should remain unsold, after the particular purposes were answered, a trust must therefore necessarily result for the benefit of him and his heirs, according to the established rules both of law and equity; consequently, there could be no foundation for a court of equity to control or abridge the operation of the deeds of 1715, by confirming them to be only a revocation *pro tanto*, merely to disinherit one of the coheirs at law; and of this opinion was Lord Chancellor King, assisted by Sir Joseph Jekyll, and Lord Chief Baron Reynolds: and it was decreed accordingly. And on appeal to the House of Lords, the judges having delivered their opinions *seriatim* upon the question, Whether the deed of 1715 were a revocation of the deed of 1712; and if so, whether the said deed of 1715 were a total revocation, or a revocation *pro tanto*? it was ordered, that the appeal should be dismissed, and the decree affirmed.]

4thly, The power of revocation follows the estate.

Thus, in a covenant to stand seised to the use of A for life, remainder to B and his heirs, with power of revocation upon payment of money by A or his assigns, to B or his assigns; if B dies, A may tender to the heir, who is in law the assignee to this purpose.

Gilb. Law of Uses, 145, cites Ley, 55, 57, Allen's case.

5thly, A power of revocation is in some cases ‖the subject of‖ a forfeiture.

If there be tenant for life, with power of revocation over the estates in remainder, and the revocation depends upon circumstances inseparably annexed to the person of tenant for life, this cannot be forfeited; but, if it depend upon circumstances which may be performed by another, the king shall take advantage of it, and revoke the uses: as, if the revocation is to be by writing under the parties' own hands and seals, this cannot be forfeited to the king; but, if the revocation is to be upon tender of a ring by himself, or any other for him during his life, this power is forfeitable.

1 Vent. 128, 132; Smith v. Wheeler, Gilb. Law of Uses, 146.

6thly, If a man makes a feoffment with power of revocation, when he hath executed that power he cannot limit new uses upon the same feoffment; but otherwise it is, if he had power to revoke and limit new ones on the same feoffment, for then he might revoke and limit new uses, with a second power of revocation, &c., and so *in infinitum*.(*a*)

1 Vent. 198, Jones v. The Countess of Manchester; 2 Roll. Abr. 262; ‖S. C. 3 Keb. 7, *nomine* Fowler v. Jones. (*a*) A deed executed under a power is not revocable, unless a power of revocation is reserved; and every power reserved in a deed *executing* a power will be strictly construed; and therefore a mere power of revocation in such a deed will not authorize a limitation of new uses. Ward v. Lenthal, 1 Sid. 343. But it seems that though, in an *original* settlement, a power of revocation only be reserved, yet a power to limit new uses is implied. Fowler v. North, 3 Keb. 7. Anon., 1 Chan. Ca. 242; Colston v. Gardner, 2 Chan. Ca. 46, unless a contrary intention can be collected from the whole settlement, Anon., Stra. 584; or the estate is expressly limited to other uses. Atwaters v. Birt, Cro. Eliz. 856. Sir E. Sugden's note, Gilb. on Uses, 319.‖

Where a conveyance to uses inures by way of transmutation of possession, the uses may be revoked without deed.

2 Salk. 677, Jones v. Morley.

[Where a power of appointment is given, a power of revocation is likewise given, although no express power of revocation be reserved in the deed creating the power of appointment. And where there is a power of revocation, the law also gives a power to limit new uses,(*b*) though no power of new limitation be expressed in the deed; for he who has power to revoke has also power to limit.

Adams v. Adams, Cowp. 651. (*b*) Colston v. Gardner, 2 Ch. Cas. 46; Lady Hastings's case, 3 Keb. 7;] ‖Gilb. on Uses, by Sugden, 319, 429.‖

{By a marriage settlement made by tenant in tail, he settles the premises to himself for life and to the children of the marriage in strict settlement; with a proviso that it shall be lawful for him by deed or instrument in writing attested by three witnesses, and to be enrolled, with the consent in writing of certain trustees, to revoke the old and to declare new uses. A deed of revocation executed by him and all the trustees in person except one, whose consent was given by means of a general power of attorney before made by him to the settler to consent to any such deed he might think proper to make, by virtue of which the settler executed the deed for and in the name of that trustee, is bad, though properly attested and enrolled: for the consent so given is not sufficient, because it would operate as a total

destruction of the check intended by requiring the personal approbation of the trustees. And another deed of revocation properly executed and assented to, but not enrolled till after the settler's death, will also be void: for every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the lifetime of the person by whom it is to be executed. Neither can the defect of one deed be supplied by the other.

3 East, 410, Hawkins v. Kemp.

A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife *or the survivor* of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment reserving to them and the survivor a power of revocation and appointment.

1 East, 442, Brudenell v. Elwes.}

3. *How they may be suspended, revived, or extinguished.*

It has been shown that where a feoffment, &c., is made to feoffees to contingent uses, and the feoffees make a feoffment over before the contingent uses happen to be *in esse*, that thereby the uses are destroyed for ever.

‖*Sed* vide Gilbert by Sugden, 288.‖

But if, in case of a feoffment to contingent uses, the feoffees are *disseised* before the contingent uses vest, hereby these contingent uses are only *suspended;* and by the re-entry (*a*) of the feoffees the ancient uses will be *revived.*

‖(*a*) The doctrine contended for by Sir E. Sugden and Mr. Fearne, that contingent uses are not executed by means of a *scintilla juris* in the feoffees, does away with the necessity of an actual entry in such case, and makes the *right* sufficient to support the contingent uses. See Fearne's Cont. Rem. 294, 295; Gilbert by Sugden, note, p. 296; Sugden on Pow. c. 1, § 3.‖

And therefore, if the feoffees release to the disseisor, and thereby bar themselves of their entry, the uses are *extinguished*, and shall not be revived; and the party grieved has no remedy but in Chancery against the feoffees for breach of trust.

(H) Of the Cases out of the Statute.

It has been observed, that there are three ways of creating a use or trust, which the statute cannot execute; as, where uses are limited upon uses; or where a term is raised and limited in trust; or, lastly, where lands are limited to trustees to pay over the rents and profits.

See *antè*, letter (D.) ‖The leading case deciding that a use cannot be limited on a use in Tyrrell's Ca., Dyer, 155 a. See Sir E. Sugden's remarks on this narrow construction of the statute, Gilb. on Uses, 348, and Blackstone's Com. 335.‖

1. *Where uses are limited upon Uses.*

Thus, if a man bargains and sells his lands to A to the use of B, the statute cannot execute the use in B; for by the bargain and sale, which implies a consideration, there is a use in A; and before the statute it was impossible that two distinct persons should have the use of the same land.

Gilb. Law of Uses, 162. ℔ The statute of uses does not execute a use upon a use. M'Cartee v. Orphan Asylum Society, 9 Cowen, 437.℈

℔ The statute does not execute a use upon a use, nor a chattel interest, nor where the trustee not only holds the estate, but has some act to do, as to receive the rents and profits, or to convey, &c.

Wilson v. Cheshire, 1 M'Cord's Ch. 238.℈

(H) Of the Cases out of the Statute. (*Attendant Terms.*)

And by the statute, the first use cannot be executed in A, since there could not be two plenary possessors, and the second use being contrary to the disposition to A, must be null and void. But the Chancery that looks upon the interest of the parties in conveyances, construes A only as an instrument to take the legal estate; and that in conscience he is bound to answer the trust to B which he hath taken. *Quære tamen*, if the consideration moves from A?

Chan. Ca. 114, 115, Ash v. Gallen; Gilb. Law of Uses, 162.

If a man enfeoff another to the use of J S and his heirs, and upon this consideration, that if J N shall pay so much money, then the said J S and his heirs shall be seised to the use of J N and his heirs, J N pays the money, the use is not executed to him by the statute; but the Court of Chancery will undoubtedly support such trust.

Gilb. Law of Uses, 162; Poph. 81, Dillon v. Fraine.

A devise supposes a consideration; and therefore it cannot be averred to any other use than to the use of the devisee; for that were an averment contrary to the design of the will appearing in the words.

4 Rep. 4, Vernon's case. ‖See Gilbert, by Sugden, 333, n.‖

But if a use be expressed, it shall be to the use of *cestui que use*, and will execute; for the will has only an implied use where no other is limited, and *expressum facit cessure tacitum*.

2 Vent. 312, Burchett v. Durdant. ‖The point in the text (though not a point adjudged in Burchett v. Durdant) is correctly stated, for though it has been questioned, it is now quite clear that the statute does extend to devises to uses. See Hartop's ca., 1 Leo. 253; Andrews's ca., Mo. 107; Popham v. Bampfield, 1 Vern. 79; Broughton v. Langley, 2 Ld. Raym. 873; Hopkins v. Hopkins, 1 Atk. 589; Bagshaw v. Spencer, 1 Ves. 143; Perry v. Phelps, 1 Ves. jun. 255; Thompson v. Lawley, 2 Bos. & P. 311; Butl. Co. Lit. 271 b, 3, § 5; Pow. on Dev. 272; 1 Sand. on Uses, 195; Sugden on Pow. 118; Gilb. on Uses by Sugden, 356. In one of the main points actually adjudged in Burchett v. Durdant, that case has been overruled by subsequent cases, viz., in deciding that a devise to A in trust to permit B to receive the rents and profits, carried the legal estate to A, and only a trust to B, whereas it is now settled that in such case the trust is executed in B. See Shapland v. Smith, 1 Bro. C. C. 74; Silvester v. Wilson, 2 Term R. 444; Harton v. Harton, 7 Term R. 652; Kenrick v. Beauclerk, 3 Bos. & Pul. 175; Wagstaff v. Smith, 9 Ves. jun. 524; Right v. Smith, 12 East, 455. Where the devise is unto and to the use of the trustees, it carries the legal estate to them. 15 Ves. 371; Gilb. on Uses, by Sugden, 47, n. See *post*, p. 174.‖

But if lands be devised to A during the life of B, in trust for B, the remainder to the heirs of B now living, this is a Chancery trust in B, and not executed by the statute; for this was the design of limiting an estate to A, that a tail might not be executed in B, whereby he might have a power to dock it.

2 Vent. 312, Burchett v. Durdant; Gilb. Law of Uses, 162.

2. *Where Terms are raised and limited in Trust; and these Limitations are twofold.*

1. Of such as wait on the Inheritance.
2. Of Terms in Gross.

1. Of Terms which wait on the Inheritance.

The original of these was in the time of Queen Elizabeth, when mortgaging by way of raising terms was invented; and then if a marriage settlement was made, or a purchase upon a valuable consideration, and the mortgage was discharged by the purchase-money, or the marriage portion,

it was thought fit (*a*) to take an assignment of the term in trust to the same persons to whom the inheritance was limited, to protect it against latter mortgages.

Gilb. Law of Uses, 163. [(*a*) The reason of this was, that the terms do not determine, unless there be a special proviso, by the performance of the trusts for which they were created. In these cases the legal interest, during the continuance of the term, is in the trustee, but the owner of the estate is entitled to the equitable and beneficial interest. As courts of common law had determined, that the possession of the lessee for years was the possession of the owner of the freehold, courts of equity determined, that where the tenant for years was but a trustee for the owner of the inheritance, he should not oust his *cestui que trust*, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance; it follows the descent of the heir and all the alienations made of the inheritance, or of any particular estate or interest carved out of it, by deed, will, or act in law. Whitchurch v. Whitchurch, 2 P. Wms. 236; Gilb. R. 168; 9 Mod. 124; Charlton v. Low, 3 P. Wms. 330; Villiers v. Villiers, 2 Atk. 72; Willoughby v. Willoughby, Ambl. 282; but more fully reported 1 Term R. 763; Goodright v. Sales, 2 Wils. 329; Scott v. Fenhoulet, 1 Bro. Ch. R. 69; {7 Ves. J. 567, Maundrell v. Maundrell; 10 Ves. J. 246, S. C.; 9 Ves. J. 509, Capel v. Girdler.} But, though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law; and the whole benefit and advantage of the term arises from this separation, by affording the means of protecting *bonâ fide* purchasers of real estates, and also of enabling courts of equity to keep real estates in the right channel; courts of equity considering such terms as creatures of equity. See Mr. Butler's note, Co. Lit. 293, and Willoughby v. Willoughby, *ubi suprà*; and Nourse v. Yarworth, Finch's R. 160. And though it seems to be now settled at law, that a plaintiff in ejectment ought not to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, yet to effect this the jury must presume in either of these cases the term to be surrendered; for without a surrender, the estate of the trustee must prevail at law. Goodtitle v. Knott, Cowp. 46; Doe v. Pott, Dougl. 721; Lade v. Holford, Bull. N. P. 110; Doe v. Pegge, 1 Term R. 758; Doe v. Staple, 2 Term R. 698; Doe v. Sybourn, 7 Term R. 3; Goodtitle v. Jones, Ibid. 47; {8 Term, 2, Doe v. Wharton; Ibid. 122, Roe v. Reade; 12 Ves. J. 239, 251, Hillary v. Waller; 5 East, 138, Doe v. Wroot; 6 Ves. J. 184, Evans v. Bicknell; 9 Ves. J. 31, Walwyn v. Lee; 10 Ves. J. 262, Maundrell v. Maundrell; 2 Johns. Rep. 84, Jackson v. Chase; Ibid. 221, Jackson v. Pierce; 3 Johns. Rep. 422, Jackson v. Deyo. Vide 1 Hen. & Mun. 228; 1 Binn. 133.} At law every term standing out is a term in gross. The difference in equity is produced by affecting the person holding the term with a trust to attend the inheritance, which may be either by express declaration, or by implication of law. If it be by express declaration, it is immaterial whether the term, if in the same hand with the inheritance, would or would not merge, or whether it be subject to some ulterior limitation, to which the inheritance is not subject; for the express declaration is sufficient to make it attendant upon the inheritance. If it is to be made attendant upon the inheritance by implication of law, then it is necessary that it should not be subject to any other limitation, and that the owner of the inheritance should be entitled to the whole interest in the trust of the term; so that according to the rule laid down in Best v. Stamford, Pr. Ch. 253; 2 Freem. 288, if the term and inheritance had been in the same hand, the term would have merged. The intent to purchase the whole interest will not, it seems, be sufficient to make the term attendant on the inheritance by implication of law. Scott v. Fenhoulet, 1 Bro. Ch. R. 69. But any limitation, though void in law, which shows an intention to sever the term from the inheritance, will be sufficient for that purpose. Hayter v. Rod, 1 P. Wms. 359. And therefore a term, though limited in trust for A and his heirs, will devolve on the personal representative of A. Hunt v. Baker, 2 Freem. 62; Attorney-General v. Sandys, Ibid. 131. And though a term raised for a particular purpose, will, when such purpose is answered, vest in the heir, yet he must take it as a term, and it will go in a course of administration, and not in a course of descent. Levit v. Needham, 2 Vern. 138.]

And hence it is, that if the inheritance was limited in tail, with remainder over, the trust of the term might be limited in the same manner; and, therefore, if the tail was docked by fine and recovery, the trust of the tail and remainders ceased, and attended the inheritance in fee; for the trusts

could not protect or attend these estates that were not in being; and the trustee, who is but an instrument to protect others, cannot have it to his own use.

Cas. of Perp. 3, 4, 5, 11.

‖The earlier cases, as to presuming surrenders of outstanding terms, are referred to in the note, p. 169, *suprà*. Where the trustee *ought* to convey to the beneficial owner, it seems now clear that in general a court of law will leave it to the jury to presume that he has conveyed, where such a presumption may reasonably be made, in order to prevent a just title from being defeated by a mere matter of form.

Doe v. Sybourn, 7 Term R. 2; and see Bartlett v. Downes, 3 Barn. & C. 616.‖

But in such cases the court must first see that there is nothing but the form of a conveyance wanting; and in no case can such a presumption be made where it would have been contrary to the duty of the trustee to have conveyed to the party.

Keane v. Deardon, 8 East, 267.

Where Lord Oxford had executed in 1727 a mortgage for 1000 years, and in 1751 he executed a marriage settlement, reciting that 27,000*l*., part of the lady's fortune, was to be applied to the discharge of the mortgage; and since that time no mention was made of the term, till in a mortgage-deed of 1802 it was assigned to secure the mortgage-money: on an ejectment being brought by a party claiming under the assignees of the term, it was objected for the defendant that it must be presumed to be surrendered,—first, since the recital in the deed of 1751 showed that an adequate sum was to be applied to discharge the mortgage, and there was no evidence of the term having been recognised till 1802; and secondly, that the deeds could not have come into the possession of Lord Oxford, unless the money had been paid off. The Court of King's Bench and the learned baron who tried the cause held, that a surrender could not be presumed, since there was no purpose of justice to be answered by presuming it; nor was it for the interest of the owner of the inheritance: it might have been his intention to keep alive the term.

Doe dem. Graham v. Scott, 11 East, 478.

Where a term was assigned in 1735 to raise an annuity, and subject thereto to attend the inheritance, and no act had been subsequently done to recognise the term, except that on sale in 1801 of a small part of the estate, for redeeming the land-tax, the owner had covenanted to produce to the purchaser the deeds creating and assigning the term; the term was presumed, in 1819, to be surrendered. It is to be observed, that this was an ejectment brought by a party claiming as heir at law, against another person claiming the same character; and the court distinguished this from Doe v. Scott, since there the term had been dealt with as subsisting; and it would have been prejudicial to the owner of the inheritance, if a surrender had been presumed: here it was considered for the interest of the owner of the inheritance,(*a*) that the term should be treated as surrendered.

Doe v. Wrighte, 2 Barn. & Ald. 719. (*a*) Independent of the event of the particular suit in which the question arises, it seems that in all cases it is for the benefit of the owner of the inheritance that the term should be outstanding as a protection against encumbrances; while, on the other hand, there is in all cases the inconvenience of being obliged to find out the termor or his representative, and incur the expense of an assignment, which inconvenience of course increases as the term grows older.

(H) Of the Cases out of the Statute. (*Attendant Terms.*)

In a recent case, the doctrine of presuming surrender appears to have been carried to a greater extent than in former cases. In 1762, a mortgage-term of 1000 years was created by Francis Hare Naylor, the owner of the fee; and several other charges were made previously to and in the year 1770. In 1771, Naylor devised the estate to trustees to sell. In 1779 they sold and conveyed to J. Newman in fee; and the 1000 years' term was, in consideration of the payment of the mortgage-money, assigned by a separate deed in 1779 to Denman, his executors, administrators, and assigns, in trust for the said John Newman, his heirs and assigns, and to be assigned, conveyed, and disposed of as he or they should direct and appoint, and in the mean time, and until such appointment, to attend the inheritance. In October, 1790, John Newman died intestate, leaving Richard his brother and heir. In November, 1797, Richard died, leaving Richard his son his heir, then a minor. In 1808, the last-named Richard gave a warrant of attorney to the lessor of the plaintiff, to enter up judgment, which was immediately done. In 1810, Mr. Denman, the trustee of the term, died intestate, leaving J D his son and next of kin. In 1814 Richard Newman, on his marriage, settled the estate to the use of himself for life, with remainder in strict settlement. In 1816 he sold and conveyed his life-estate to his mother, and she devised the estate to certain persons under whom the defendant was tenant. In 1818, the lessor of plaintiff revived the judgment by *scire facias*, and issued an *elegit;* and, on the 13th of March, 1818, an inquisition was taken thereon, and then the ejectment was brought. In 1819, (after the commencement of the ejectment,) John Denman, as son and next of kin of Mr. D., took out administration to him; and by direction of the devisees of the purchaser, in the usual way assigned the term to John Newman, a trustee for them, to attend the inheritance. The learned judge left it to the jury to presume a surrender of the term, which they did, and found a verdict for the lessor of the plaintiff. And the Court of King's Bench afterwards confirmed the direction, the Chief Justice, in his judgment, relying principally on the length of time elapsed, during which the term was never dealt with or recognised; especially on its not having been in any way noticed on the marriage settlement made in 1814, and the conveyance by Richard Newman to his mother in 1816. The above decision powerfully attracted the attention of the profession.

Doe dem. Putland v. Hilder, 2 Barn. & A. 782. Lord Eldon is stated to have disapproved of this decision on several occasions, Sugden Ven. & P. 440, 443, 445; and see Sir E. Sugden's observations on it, Ibid.; and see the observations of Lord Eldon on this doctrine, 6 Ves. 184; and of Sir Thomas Plumer, 2 Jac. & W. 158; and 1 Cru. Dig. 486.

An ejectment was afterwards brought by the Newmans and Denman against Putland, the lessor in the former case, to recover back the estate. On the trial, the lessors of the plaintiff proved a mortgage in fee to one Markwick, in August, 1814, by R. Newman the son, who afterwards made the marriage settlement. By this mortgage, which was not produced on the former ejectment, all deeds were granted; and it contained a general declaration of trust of all terms for the mortgagee; and it appeared that the assignment of the term in 1779 was delivered over to Markwick, and was contained in a schedule of title-deeds, made at the time of the mortgage, and signed by Markwick; and also, that by a deed in 1819, Newman the trustee of the 1000 years' term, declared that he would stand

possessed of it in trust for Markwick, to secure the mortgage money. The learned judge said the facts were very different from those proved on the former trial. Here the deeds were handed over to the mortgagee before the settlement and conveyance, which accounted for the term not being mentioned in those securities: and the circumstance of the deed having been scheduled and handed over to Markwick, showed that the term had not been surrendered; and under his direction the jury found that the term was subsisting and reserved any question of law. On a motion for a new trial, the Chief Baron said he did not think the doctrine of presumption a correct doctrine. It was a very serious point; and of late the doctrine had been carried to a very frightful extent. The court gave the defendant leave to state a case for argument on another question; but the point as to the surrender of the term was put at rest; and the suit was afterwards compromised to the advantage of the Newmans.

Doe v. Putland, Sugden Ven. & P. 421, (6th edit.)

Where a term was created in 1711 for raising portions, and there was no evidence of the payment of the portions, and a settlement of the estate took place in 1744, containing a covenant that it was free from encumbrances, and it did not appear that an assignment had ever been made, Sir John Leach, V. C., held, that a surrender might be presumed; and that in matters of presumption the court would bind a purchaser, where it could give a clear direction to a jury in favour of the fact.

Emery v. Grocock, 6 Madd. 54; and see Ex parte Holman, Sugden Ven. & P. 447, (8th edit.)

It has been decided that, to protect a purchaser against dower, it is necessary to take an actual assignment of the term to a trustee for him; but this appears to be rather an excepted case.

Maundrell v. Maundrell, 10 Ves. 259.‖

The entailing of a term is not within the statute *de donis condit.*, for that statute extends only to estates of inheritance, and not to chattels, which the rules of the common law have carried into another channel.

Cas. of Perp. 3, 11.

And therefore in this case the trustee and tenant in tail may dispose of it without a fine or recovery; and this, upon valuable consideration, will bind the issue; because, since the Chancery are not bound by the statute, they are at liberty to direct the rules of equity, and it is not equity to set up the trust to the issue when the ancestor has received for it a valuable consideration.

Cas. of Perp. 3; Gilb. Law of Uses, 164.

It will likewise be assets to pay intestates' debts, for all chattels of intestates are assets at common law; and it is not equity to direct it otherwise.

Cas. of Perp. 3; Gilb. 164. [A term to attend the inheritance is real assets in the hands of the heir; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance, and which is subject to all charges which affect the inheritance, must be so also. Attorney-General v. Sir G. Sandys, Hardr. 489; Willoughby v. Willoughby, 1 Term R. 766.]

But, if the inheritance of a use be entailed, the alienation of tenant in tail will not devest it out of the issue; for it is within the intent of the statute *de donis*, which says, that if an estate be thus limited, the donee shall not alien to prejudice his issue; and the Chancery interpreting men's contracts, is bound by the intent of an act of parliament.

Gilb. Law of Uses, 165; ‖Co. Lit. 20.‖

(H) Of the Cases out of the Statute.

If a term be given to A in trust for B in tail, with remainder over, attendant on an inheritance, and A surrender to B, this shall not destroy the remainder; for though the surrender destroys the estate at law, yet the trust remains in equity, if the party had notice.

Gilb. Law of Uses, 165.

But in case A or B had aliened upon valuable consideration, without notice, this would have destroyed the equity of the issue and the remainder-man.

Gilb. Law of Uses, 165.

2. Of Terms in Gross.

Concerning terms in gross much hath been said already; it only remains to add, that

If a lease be limited in trust, and the trustee renew the lease, it shall be to the benefit of *cestui que trust;* for if the trustee take on him the trust, he takes upon him to act for the benefit of the party to whom the advantage of the term was originally designed.

1 Ch. Cas. 190, Holt v. Holt; ‖Keech v. Sandford, Sel. Chan. Ca. 61; Abney v. Miller, 2 Atk. 593; Edwards v. Lewis, 3 Atk. 538; James v. Dean, 11 Ves. 383; 15 Ves. 236. So, if a mortgagee renew a lease, it inures to the benefit of the mortgagor, 2 Freem. 13. If partners hold a lease, and one obtain a renewal, both shall have the benefit of it, 10 Ves. 29; and the rule is the same as to joint lessees. Palmer v. Young, 1 Vern. 276; and see Gilb. on Uses by Sugden, 360, *notâ.*‖

3. *Where Lands are limited to Trustees to pay over the Rents and Profits.*

{Where something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or to make a conveyance, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate.

2 Saun. 11, n. 17, by Serj. Williams; 3 Bos. & Pul. 178; 7 Ves. J. 201.}

If lands are devised to trustees and their heirs, in trust for a feme covert, and that the trustees shall from time to time pay and dispose of the rents and profits to the said feme covert, or to such persons as she, whether sole or covert, shall appoint, and that her husband shall have no benefit thereof; and as to the inheritance, in trust to such persons as she by will, or other writings under her hand, shall appoint; and for want of such appointment, to her and her heirs; this shall be a trust, and not a use executed by the statute.

1 Vern. 415, Nevil v. Saunders; {M'Cartee v. Orphan Asylum Society, 9 Cowen, 437, *acc.*}

But, where a man devised the rents and profits of certain lands to T B the wife of W B during her natural life, to be paid by his executors, into her own hands, without the intermeddling of her husband, and after her decease he devised them to others; it was held by Rokeby and Eyre, Justices, that the lands themselves belonged to the wife, against Holt, C. J., who held strongly, that the executors were only trustees for the wife.

1 Salk. 228, South v. Alleine; Comb. 375, S. C.; and 5 Mod. 63, by the name of Bush v. Allen. Adjudged by two justices against the opinion of Holt, C. J.; but the reporters differ as to the opinion of the Chief Justice. {This case was overruled in Harton v. Harton, 7 Term, 652.}

(H) Of the Cases out of the Statute.

Likewise where lands were devised to trustees and their heirs, in trust to pay several legacies and annuities, and to pay the surplus of the rents and profits to a married woman, during her life, for her separate use, or as she should direct; and after her death the trustees to stand seised to the use of the heirs of her body, with remainders over; the question was, Whether this devise to pay the surplus of the rents and profits to the wife, was such a use or trust as was executed by the 27 H. 8; for if it was, then it was urged, that she, being tenant for life, the limitation after to the heirs of her body being coupled with it, gave her an estate-tail, according to Shelly's case, 1 Rep.; but, if it did not, then the eldest son was to take as a purchaser. It was held by the court, that she had only a trust for life, and, consequently, the heirs of her body must take by purchase; and the rather in this case, because it was limited to the heirs of her body severally and successively, as they should be in seniority of age and priority of birth, and the heirs of their respective bodies issuing. And a difference was taken between this case and that of Broughton and Langley, 2 Salk., for there it was to permit A to receive the rents and profits for life; but here it is a trust in the trustees to pay over the rents and profits to such and such persons; and therefore the estate must remain in them to answer these trusts; otherwise she must be the trustee, contrary to the express words of the will.

1 Cas. Eq. Abr. 383; Jones v. The Lord Say and Seal, [3 Bro. P. C. 458, S. C.]

But, if lands are devised to trustees and their heirs, on trust to permit A to take the profits for his life, and after the trustees to stand seised to the use of the heirs of the body of A, A has an estate-tail executed in him; for this being a plain trust at common law, what is so, must be executed by the statute, which mentions the word *trust* as well as *use*.

2 Salk. 679, Broughton v. Langley. And *per* Holt, C. J., the same point *cont.* in the case of Burchett v. Durdant, 2 Vent. 312, is not law.

[A testator devised lands to trustees upon trust, that they, their heirs and assigns, should yearly, by equal quarterly payments, by and out of the rents and profits of the premises, after deducting rates, taxes, repairs, and expenses, pay such clear sum as should then remain to his brother C S, and his assigns, during his natural life, and after his decease to the use and behoof of the heirs male of the body of the said C S lawfully to be begotten, as they should be in priority of birth; and in default of such issue, remainder over. Eyre, B., and Master Holford, thought that the estate for life was executed in C S; but Master Hett differed. And upon a rehearing Lord Chancellor Thurlow expressed his opinion, that the trustees being to pay the taxes and repairs, they must have an interest in the premises; and therefore that the *legal* estate for the life of C S was in them; and that C S had only an *equitable* estate for life, and the subsequent estate being executed could not unite; and of course that a recovery suffered by C S was void.

Shapland v. Smith, 1 Bro. Ch. R. 75.

Again, lands were devised to trustees and their heirs, upon trust to stand seised thereof during the natural life of testator's son J S, to such use and behoof as after mentioned, viz., that the trustees should yearly and every year, during the natural life of the said J S, take and receive the rents, issues, and yearly profits of the premises; and the testator ordered, that such rents, issues, and yearly profits should be applied for the

subsistence and maintenance of the said J S during his natural life; and immediately from and after his decease he devised the same premises unto the heirs of the said J S lawfully to be begotten, and for default of such issue, then to his own right heirs. The court held, that the use was not executed in the testator's son, but in the trustees *during his life*, from the nature of the trust to *receive and pay over the profits*, and the *application* directed for the subsistence and maintenance of the son, by which the testator seemed to invest the trustees with some degree of *discretionary* power in that respect. And there being nothing in the nature of the trust to prevent the limitation to the heir of his body from being a *use executed*, they held the two limitations did not unite so as to give J S an estate-tail.

Silvester v. Wilson, 2 Term R 444.] ‖See Kenrick v. Beauclerk, 3 Bos. & Pul. 178; Tenny v. Moody, 3 Bingh. 3; Houston v. Hughes, 6 Barn. & C. 403.‖

‖So, where a devise was to trustees and their heirs, upon trust to permit a married woman to receive the rents and profits during her life, for her own sole and separate use, notwithstanding her coverture, and without being in anywise subject to the debts or control of her then or after-taken husband, and her receipt alone to be a sufficient discharge with remainder over, it was held, that the legal estate was vested in the trustees; for it being the intention of the testator to secure to the wife a separate allowance, free from the control of her husband, it was essentially necessary that the trustees should take the estate with the use executed in order to effectuate that intention.

Harton v. Harton, 7 Term R. 652; and see Doe v. Simpson, 5 East, 162; Robinson v. Grey, 9 East, 1.

In general the distinction is, that where the limitation to trustees and their heirs is in trust *to receive the rents and profits and pay them over to A for life*, this use to A is not executed by the statute, but the legal estate is vested in the trustees, to enable them to perform the will; but where the limitation is to trustees and their heirs in trust, to *permit and suffer A to receive* the rents and profits for his life, the use is executed in A, unless it be necessary the use should be executed in the trustees, to enable them to perform the trust, as in the case of Harton v. Harton, *suprà*.

2 Will. Saund. 11 d.

Where the devise was to the trustees and their heirs, in trust to pay unto, or permit and suffer the testator's niece to have, receive, and take the rents and profits for her life; it was held, that the use was executed in the niece, because the words *to permit, &c.*, came last: and in a will, the last words shall prevail.

Doe dem. Leicester v. ————, 2 Taunt. 109.

Where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust-estate.

Somerville v. Lethbridge, 6 Term R. 213; Keene v. Deardon, 8 East, 248; Wright v. Smith, 12 East, 455; Gregory v. Henderson, 4 Taunt. 772; Murthwaite v. Barnard, 2 Bro. & B. 623.

{A devised thus: "As to my real and personal estate, subject to my debts and funeral expenses, I give and devise the same as follows, viz., my real estates, and also my personal estate unto J M and O W and their

heirs on the following trusts, viz., to the intent that they dispose of my personal estate in discharge of my debts, funeral expenses, and such legacies as I may direct; and as to my real estates, subject to my debts and such charges as I may make, I give and devise the same to R P for life." It was held that under this devise the legal estate in the realty vested in R P for his life, and J M and O W took no estate therein. For unless it appeared manifestly that the testator intended that the trustees should be active in paying the debts, the legal estate would not vest in them. And as to the real estate, he did not direct the payment to be made by the trustees, but only devised it *subject* to his debts.

3 Bos. & Pul. 175, Kenrick v. Lord Beauclerk.}

(I) Of resulting Uses, or Uses by Implication.

HERE it is to be premised that the mere alteration of possession does not, in *equity*, give a right, but it shall be to the use of the donor, &c., unless the use is *expressed*, or there is a *valuable consideration*. Thus,

‖Resulting uses are expressly excepted out of the Statute of Frauds, which requires declarations of trusts to be in writing. 29 Car. 2, c. 3, § 7, 8. But for this exception there could have been no resulting use upon a fine, feoffment, or recovery, though made without consideration. But as a use only results by presumption of law, it may be rebutted by even a parol declaration in favour of the person to whom the assurance is made. See Gilb. by Sugden, 118.‖

If a man makes a feoffment without consideration, and expresses no use, the feoffment is intended by the law to be to the use of the feoffor and his heirs.

Bro. *Feoff. al Uses*, pl. 32. In this case the law makes not any consideration, because the feoffee shall not hold of the feoffor, &c., but of him of whom the feoffor held: and this by the statute of *quia emptores*, &c. Dy. 146 b, pl. 71, S. P., *Arg.* in case of Villers v. Beaumont.——But before the statute of *quia emptores terrarum*, if a man made a deed of feoffment without any consideration or cause, the feoffee should have had this to his own use, because there was tenure between feoffor and feoffee. Dy. 146 b, pl. 71, Villers v. Beaumont; and see Barnard. Chan. R. 387, Lloyd v. Spillit.

But, if one, without any consideration, enfeoffs another by deed, to hold to the feoffee and his heirs to his own use, and the feoffee suffers the feoffor to occupy the land several years, yet the right is in the feoffee; because *express* use is contained in the deed, which is sufficient without other consideration. The same law is, when a feoffment is made to the use of a stranger and his heirs.

And. 37, pl. 95, Anon. There is a difference between raising uses by fine, feoffment, or other conveyance, which operates by transmutation of possession, and uses raised by covenant; for upon the first, if no uses were expressed, it is equity that assigns the feoffor to have the use; for by the law the feoffor has parted with all his interest; but, where he expresses uses, there can be no equity in giving him the use against his own will; and there can be no presumption that the conveyance was to the use of the feoffor against his own declaration. But in case of a covenant, it is equity that must give a use, for the person can have no right by law; therefore, in such case there can be no use without a consideration; for there is no equity that there should. Gilb. Law of Uses, &c., 222, 223.

That which cannot vest in him to whom it is limited, shall return to the feoffor; as, if I make a feoffment in fee to the use of myself for life, and after to the use of my second wife, all the fee is now in me; and when I take a second wife, then the feoffees shall be seised to the use of such wife in remainder for her life; *per* Manwood, J.

2 Le. 19, pl. 25, in Brent's case.

Likewise, if one seised of land of the part of his mother makes feoffment in fee without consideration, he shall be seised as he was before, viz., of the part of the mother.

2 Rep. 58 a, Beckwith's case.

In like manner, if a man suffers a common recovery, or levies a fine (*a*) of land, and limits no use, this shall be to the use of him who suffers the recovery or levies the fine.

Godb. 180, Bury v. Taylor. Where one seised in tail suffers a recovery, and declares no use, the use results to the tenant in tail, and he becomes seised in fee by virtue of the recovery, because the recoveror is tenant in fee-simple, and then no uses are declared of that recovery; and where no consideration appears from the recoveror, the recovery can be to no other purpose than to dock the entail. Gilb. Law of Uses, 61. [(*a*) But there is a difference between a fine or recovery as to the operation on the descent. If tenant in tail by *descent ex parte maternâ* suffer a recovery, in that case, it is true, the estate will continue notwithstanding the recovery in the same line, and descend to the heirs *ex parte maternâ*; but if tenant in tail by *purchase*, with a reversion in fee by descent, both *ex parte maternâ*, suffer a recovery, he must take the resulting fee as a *purchaser*. For the estate that passes by the recovery is the estate-tail, the old estate-tail, now considered as a fee: the party comes in in continuance of that estate-tail; which, being by purchase, must of course descend to the heir at law. But it is otherwise, where tenant in tail, with remainder to himself in fee, levies a fine; for the fine extinguishes the estate-tail, and passes a base or qualified fee; and that fee becomes merged in the other fee; and the reversion being so let in, the estate continues in the same line. Martin v. Tregonwell, 2 Stra. 1179; 1 Wils. 2, 66, S. C.; 4 Bro. P. C. 486, S. C.; {Willes, 444, S. C.;} 5 Term R. 107, S. C.; Roe v. Baldwere, 5 Term R. 104; Symonds v. Cudmore, 1 Salk. 338; Carth. 258, S. C.; Skin. 339, S. C.; 1 Show. 370; 4 Mod. 1, S. C.]

Likewise, if two join in a common recovery where one has nothing in the land, and no use is limited upon it, this shall be to the use of him only who had the interest in the land, and no use shall arise to the stranger.

2 Roll. Abr. 789.

Also, if A, tenant for life, and B in reversion or remainder, levy a fine, generally, the use shall be to A for life, the reversion or remainder to B in fee; for each grants that which he lawfully may, and each shall have the use which the law vests in them according to the estate which they convey over.

2 Rep. 58 a, Beckwith's case.

So, if there are two joint-tenants, the one for life, and the other in fee, and they levy a fine without declaring any use, the use shall be to them of the same estate as they had before in the land.

2 Rep. 58 a, Beckwith's case.

[Where a person seised in fee makes a feoffment in fee without valuable consideration to divers particular uses, so much of the uses as he disposes not of is in him as his ancient use in point of reverter. Therefore, where A, seised in fee, covenanted to stand seised to the use of *his heirs male begotten or to be begotten on the* body of his second wife, it was upon this principle holden by Hale, C. J., and two other judges, that A took an estate for his own life by implication.

Co. Lit. 23 a; Pibus v. Mitford, 1 Vent. 372.

So, where the immediate use is limited away for *years only*, and no use limited of the freehold till the grantor's death, the use of the freehold shall in that case result to the grantor, and he shall take an estate for life by implication. As, where an estate was conveyed by A to the use of trustees for seventy years, if A should so long live, remainder to trustees for 3000

years, and from and after the death of A, to B his son for life; it was objected, that the limitation to B together with the remainders over were void, being an estate of freehold to commence *in futuro;* for the first freehold estate was limited to B, which was not to arise until the death of A, and no estate for life was limited to A unless an estate for life should be supposed to result to him. After solemn argument upon the point, and a case stated to the judges, it was decreed, that an estate for life resulted to A, which supported the limitation over.

Penhay v. Hurrell, 2 Vern. 370.

In a subsequent case, where the use was limited to the grantor himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder *to* (the use of) *the heirs male of his own body*, remainder to his own right heirs; the court held the limitation to the *heirs male* of the body to be void, because there was no preceding freehold limited to support it, and that it should not be implied *contrary to the intent* of the conveyance; that there the estate took effect by transmutation of possession out of the seisin of the trustees, and not like Fenwick (should be Pibus) and Mitford's case, where the owner *covenanted to stand seised* to the use of the heirs of his body; and Powell, J., held, that even in that case, if there had been an *express estate limited to the covenantor*, it had been different.

Adams v. Savage, 2 Salk. 679; and vide Dyer, 111, in margin.

And so where A by marriage settlement conveyed certain lands to the use of himself for ninety-nine years, if he so long lived, and after to the use of trustees for two hundred years, remainder to the use of the *heirs male of his own body*, remainder to his own right heirs; upon a case referred to the judges of C. B. from the Court of Chancery, they held the limitation to the *heirs male of the body of A*, void, no freehold being limited to any person precedent to that estate; and that no estate of freehold could *result to A*, for his life *by implication*, because another estate, viz., for ninety-nine years, if, &c., was expressly limited to him, which would be inconsistent with a freehold *by implication*.

Rawley v. Holland, Vin. v. 22, p. 189, c. 11; 2 Eq. Abr. 753. ‖See Goodtitle v. Burtonshaw, app. to Butler's edit. of Fearne, No. 1; Jackson v. Jackson, Fitzg. 146. The case in the text, and that of Adams v. Savage, *supra*, settled the rule, that a contingent use, like a contingent remainder, must have a preceding estate to support it; and that where a use is limited by way of remainder, it cannot take effect as a springing use; and see Sir E. Sugden's note, Gilb on U. 167, Sand. on U. 142, (4th edit.)‖

And where the use was expressly limited away *during the life* of the grantor instead of for years only, it has been held, that the freehold could not result to him, so as to unite with the subsequent limitation to the heirs of his body.

Thus, E C, on his intended marriage, settled lands by deed and fine, to the use of himself and his heirs till the marriage, and afterwards to the use of his wife for life, remainder to the use of the cognisees in the fine, and their heirs, *during the life of E C*, upon trust to permit him to receive the rents and profits, remainder to the sons of the marriage successively in tail male, and for want of such issue to the *heirs of the body* of the said E C, and for want of such issue, to the said E C and his heirs. It was agreed that the case differed from that of Fenwick v. Mitford, for there, no use a all was limited *for the life* of the feoffor, which left a vacancy the law would supply by implication; but in the principal case, there being an express estate limited to the cognisees *during the life of E C*, there was no

room left for any implication. Besides that in Mitford's case, it was held to be no other than the *old reversion* subsisting in the feoffor; but the limitation in the principal case being of a new estate, viz., *an estate-tail*, could not be any part of the old estate, which was a fee-simple. And though it was contended, that the law would imply an estate for life in E C, intermediate between the estate of the cognisees and that to the first son of the marriage, because it was possible that the cognisees might forfeit or surrender; yet the whole court was clearly of opinion, that the limitation to the heirs of the body of E C was a *contingent remainder*, and such as the heir would take by *purchase*, and not by descent; and that the case differed from that of Fenwick v. Mitford for the reasons before given. And judgment was given accordingly.

Tippin v. Cosin, Carth. 272; 4 Mod. 380; Moor, 284.

So, where A made a settlement to the use of himself for ninety-nine years, if he should so long live, remainder to the trustees and their heirs *during his life*, &c., remainder to the use of the *heirs of his body;* remainder to himself in fee; Lord Chancellor Cowper held this limitation to the heirs of the body to be plainly a contingent remainder.

1 P. W. 387, Else v. Osborne.

And in a case where A, having two sons C and D, covenanted to stand seised to the use of C and the heirs male of his body on M his wife to be begotten, and for want of such issue to *the heirs male of his* (A's) *own body*, and for want of such issue to his own right heirs for ever; C the eldest son died, leaving issue one son and several daughters, A died, and then the son of C died without issue; the court held the limitation to the heirs of the body of A to be words of *purchase*, and to vest in the son of C upon the death of A as *heir male* of his body by *purchase;* and that on the death of C's son it descended to his uncle D as heir male of the body of A *per formam doni;* and not by *purchase* as heir male of the body of A, he not being heir, as his nieces were living. They allowed no estate for life in A by implication, and seemed to doubt the doctrine in the case of Pibus and Mitford. But this difference is observable between the two cases; in that of Pibus and Mitford, the covenantor had not limited any use at all *during his own life;* whereas, in Southcot v. Stowell, the covenantor had limited a *present use* to his son C in tail.

Southcot v. Stowell, 1 Mod. 226, 237; 2 Mod. 207, 211; vide Mandevile's case, Co. Lit. 26 b; Fearne's C. R.

Archdale Palmer and his son John Palmer, upon the marriage of the son with A, settled certain lands to the use of Archdale and his heirs until the marriage; and afterwards, as to part of the lands to the use of John Palmer for life, and after intermediate remainders, (to the use of his wife for life and of his sons by her or any other woman successively in tail-male,) *to the use of the heirs male of the body of the said* Archdale Palmer, remainder to the use of the heirs of the body of John Palmer, remainder to the use of John Palmer, his heirs and assigns; and as to the residue of the lands to the use of Archdale for life, and after several intermediate limitations, (to the use of John for life and to his wife, in part, for life, and of the sons of the marriage successively in tail-male,) to the use of John and the heirs male of his body, remainder to the use of Archdale, his heirs and assigns. John died without issue male in the lifetime of his father, leaving A his widow and one daughter by her, named Ann. Archdale afterwards, by

his will, noticing that by the death of his eldest son John without issue male, that part of his estate then in possession was, by the said marriage settlement, vested in him in fee-simple, devised the said estate to his son William Palmer for life, with remainder to his sons successively in tail-male, and for want of such issue, to the *heirs male* of his (testator's) body begotten, and for want of such issue to his own right heirs for ever.

Wills et al. v. Palmer, 5 Burr. 2615; 2 Black. 687.

Archdale died, leaving his said grand-daughter Ann his heir at law, and his son William Palmer, who (as well as John his deceased brother) was the testator's issue by a first wife, and also leaving Henry, an eldest son, and several other children by his second wife. Afterwards William Palmer, who at his father's death was *heir male of his body*, died, leaving a son, who died leaving a son Henry John, who died an infant without issue; and no recovery was suffered by William or his son. Upon the death of Henry John, Henry, the eldest son and heir male of the body of Archdale by his second wife, entered upon that part of the estate which was by Archdale's will devised to the *heirs male* of his body. And afterwards, upon the death of Ann the widow of John, Henry took possession, as *heir male of the body of* Archdale, of the lands which she had held for her life under the settlement. Upon a bill filed by Ann the daughter of John, and heir general of Archdale and her husband, claiming in her right, as *heir at law and heir of the body of John Palmer*, to be entitled, on failure of issue male of the whole blood, to that part of the estate which was limited by the settlement to John Palmer in fee; and also claiming in her right, *as heir at law of* Archdale, to be entitled to the estates of which the reversion in fee was limited to him by the settlement, as not devised by his will; a case was made for the opinion of the judges of the King's Bench, upon the question, Whether any and what estate passed by the settlement to the defendant Henry Palmer, as *heir male* of the body of Archdale Palmer the *grantor?* And whether any and what estate passed to the said defendant Henry Palmer as *heir male* of the body of the said Archdale Palmer, by his will? Upon which the judges certified they were of opinion, that the defendant Henry Palmer, by the settlement, took *by descent* as *heir male of the body* of Archdale Palmer the *grantor*. That in case a *third person* had been the *grantor*, they should have thought that Henry Palmer would have taken an estate in tail-male *by purchase*, under the description of *heir male* of Archdale Palmer. And that they were of opinion, that an estate in tail-male passed to the defendant Henry Palmer, as *heir male of the body of Archdale Palmer by his will.*

No estate for life can arise by implication, or by way of resulting use, to a person who was not the owner of the estate granted. As, where husband and wife levied a fine of the wife's land to the use of the *heirs of the body of the husband on the wife begotten, and for default of such issue to the use of the right heirs of the husband;* they had issue; the wife died, then the issue died, and then the husband died; and the question was, Whether the heir of the husband or the heir of the wife should have the lands? And the court held, that no estate for life could arise to the husband by implication, because the estate was the wife's, to which he was a stranger; therefore the limitation to the heirs of the husband, &c., was void, for want of a preceding freehold to support it. An implied estate in the wife for her

life would not do, as she died before her husband, and, consequently, before the remainder to his heir could commence.

2 Salk. 675, Davies v. Speed, Show. Cas. Parl. 104.

So, where a marriage settlement was made by a *third person* to the use of A the husband for ninety-nine years, remainder to trustees *during his life*, to support contingent remainders, remainder to the wife for life, remainder to the first, &c., son of the marriage, remainder to the *heirs of the body* of A, remainder to his *right heirs;* here the freehold *during* A's *life* being limited to trustees, and he taking only a term of years, and the estate not moving from him, (for if it had, the limitation to his *right heirs* would have been the old reversion,) the remainder to his *heirs* was a *contingent remainder*.

Vide 1 P. W. 359, Sir T. Tippin's case there cited; and vide Jenk. Cent. 248, c. 18.

And where lands were devised to C for the term of ninety years if he should so long live, and afterwards to the heirs of C's body, it was held, that it vested in the heir by purchase.

Harris v. Barnes, 4 Burr. 2157.

Indeed, in a case where the testator devised in remainder (after limitations to his brother W and his heirs male) to the *heirs male* of his brother N's sons, (who then had two sons living,) without any antecedent devise to those *sons themselves*, and by a schedule annexed to the will and referred to in it, (which the special verdict found to be part of the will,) purporting to be an account how the testator had disposed of his estates by his will, he said, and for want of his brother W's having sons, then *to his brother* N's *sons*, and for want of sons, then over: Upon the question, Whether one of the sons of N took an estate for life or in tail? the Court of King's Bench in Ireland held he took only for life. But on an appeal to the King's Bench in England, Lord Mansfield, in delivering the opinion of the court, observed, that the only doubt was, whether by the words of the will the *sons of* N took any estate by implication; that such doubt was removed by the schedule, which expressly *gave an estate to the sons of N;* and therefore the son of N took an estate for life by implication *thus explained*, which being conjoined with the estate expressly given to his *heirs male* by the will, would by the known rule of law give him an estate in tail male. But this case turned on the operation of the schedule.

Hayes v. Foorde, 2 Black. R. 698.

It has been doubted, Whether there can be a resulting use on the conveyance by lease and release; that is to say, if a bargain and sale in consideration of money is made to J S for a year, and then a release is made to him in fee, without any further consideration or declaration of the use, whether in this case the use will result to the releasor.—Thus, where A brought covenant as assignee of a reversion, and showed that the lessor, in consideration of five shillings, bargained and sold to B for a year, and afterwards released to him and his heirs, *virtute quorundam indentur. barganiæ venditionis et relaxationis, necnon vigore statuti de usibus, &c.*, he was seised in fee; it was objected, that the use must be intended to the releasor and his heirs, because no consideration of the release, nor express use, appeared by the pleadings. It was argued in this case, that there could be no resulting use on a lease and release; that nothing passes to the lessee in possession, but by way of enlargement of the estate of such lessee; for it does not operate to give a new estate of the reversion, but to increase the

estate in possession, according to the words of it: so it does not work by *merger* of the first interest, but by *enlarging* it: that if the release inure only to enlarge the estate, the interest enlarged must be to the use of the lessee, else it cannot be said to be an increase of it: that if the practice had not prevailed to the contrary, it were odd to limit the use of a release to any but the lessee; for which reason it is, that we find it expressed in the clause in the lease, on which the lessor intends to build his release, that the intent of the lease was to pass an estate by release upon it, for the use of a third person: that it would be absurd to say, that my conveyance should have no other operation but to extinguish or merge the estate, which the grantee has already, in order to have brought it back to me; and what need could there be of such a way? if the party had any such intent, it might soon be done by a surrender: that if it had been expressed in the deed of release, that he had already made him a lease for *years*, and that for the enlargement of that estate he made the release, there could be no doubt but that it would be to the use of the releasee; and there is no difference between the cases, since this release, in its own nature, inures by way of enlargement; besides, here is also a valuable consideration; for the lease and release being but *one* conveyance, the five shillings, expressed to be the consideration of the lease, shall extend to the release; and also the acceptance of the release is in its own nature a consideration, for it implies an alteration of the estate of the lessee, the consent to which is a consideration moving from the lessee; and the only motive of the lessee's parting with the old estate was to get a new one. On the other side it was urged, that before the statute of 27 H. 8, c. 10, if A made a feoffment, levied a fine, or suffered a recovery without a use declared, and without any consideration, the feoffee, conusee, and recoveror stood seised of those lands to the use of A: that since the statute the law as to this matter is not altered; for the statute only intended to execute the use to the possession, and by that means to destroy the use, but it did not intend to make any other thing pass by the conveyance than that which passed before; that there was the same reason the use should not pass in a release without consideration or express declaration, as in a feoffment, fine, and recovery; because the *use* and *estate* are distinct, and though the estate passes, yet the use does not, without a consideration or express limitation of it; and they are as much distinct things in a *release* as in any other conveyance: and the precedents are, that when a release is pleaded, there always mention is made of a consideration or express use. 2 Saund. 11, 277; 2 Ventr. 120; Co. Entr. 220, 264, 474. To the objection that this release inured by way of enlargement of the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but *one* conveyance, it was answered, that though the lease and release made but one conveyance as to the passing of the fee, yet they were in truth *distinct* conveyances, and had different operations, the one by the statute of uses, and the other by the common law: that as to what was said, that the release inures by way of enlargement of the estate of the lessee, it is true that it gives him a greater estate than he had before, but that notwithstanding it destroyed the estate for years by merger, and it cannot participate of the consideration which is contained in the lease, which is perfectly distinct. However, Holt, C. J., without considering the operation of the conveyance, and admitting there might be a resulting use on it, held, that the manner of pleading the release, as above, to the releasee was good; and that if a

feoffment be pleaded in the same manner, without showing the use or a consideration, with an averment *virtute cujus* the feoffee was seised, the use shall be intended to be to the feoffee: that that was the form of pleading before the statute; and the statute has not altered, but rather confirmed, this manner of pleading.

Sand. on Uses, 480; Shortridge v. Lamplugh, 2 Salk. 678; 7 Mod. 71; 2 Lord Raym. 798; 1 Lutw. 351. ‖See Sand. on Uses, 2, 60—70, (4th edit.); Gilbert by Sugden, 233.‖ See Sand. 95, 96, 485.]

It is to be observed likewise, that when one takes a feoffment, having notice of the several uses and trusts, there, the party is supposed to take it under those uses and trusts; for the law will suppose a man's actions rather just than otherwise.

Gilb. Law of Uses, 7.

Therefore, if a feoffee to a use make a feoffment in fee upon a valuable consideration with notice, the second feoffees shall be seised to the former uses; for the consideration imports a seisin to his own use, the notice a seisin to the former uses: and where the act is capable of a double interpretation, that must be taken which consists most with equity.

Gilb. Law of Uses, 7. The reason is, for that it argues a corrupt conscience to bargain for an estate which the purchaser knows to be another's in equity; therefore as consideration or no consideration is an issue at law, so notice or no notice is an issue in Chancery. Lord Bacon's Read. on Stat. of Uses. But *Qu.* If the use is expressed to the second feoffee, for there it seems notice or no notice is immaterial. 1 And. 314.

Likewise, if A agrees with B to lease Blackacre to him for certain years, and afterwards, before he has made the lease, according to the promise, he enfeoffs C of the land for a valuable consideration, C having notice of the promise before the feoffment made; C shall be compelled in Chancery to make the lease to B, according to the promise, because of his notice.

2 Roll. Abr. 781.

But, where a man takes upon a valuable consideration without notice, there, he is supposed to take it to his own use, for otherwise he would not have given an equivalent.

Therefore, if a feoffment be made with consideration, and without notice, the feoffee shall be seised to his own use, for here the act is capable of no other construction.

1 Rep. 122, Chudleigh's case. ‖This is the rule in equity at this day. If a man purchases from another *bonâ fide* for a valuable consideration, and without notice, it is unimportant that the seller was merely a trustee. As to what amounts to notice to a purchaser, see Sugden's Vend. & P. 742, *et seq.* (8th edit.)‖

Also, if feoffee in use makes a gift in tail, the donee shall be seised to his own use; for there is a consideration, viz., a tenure between them, unless he express a use upon the gift, or in the gift; *per* Brooke, J.

Bro. *F. al Uses*, pl. 10.

If the feoffee in use makes a lease for life, he shall have fealty; for this is to the use of the lessee, if a use be not expressly reserved, &c.; *per* Brooke, J.

Bro. *F. al Uses*, pl. 10.

In like manner, if he devises by testament, the devisee shall be seised to his own use, unless it be otherwise expressed; for there is a consideration implied.

Bro. *F. al Uses*, pl. 10.

(K) Of second or shifting Uses.

So, if a feoffment be made to A to enfeoff B to the use of C, and A enfeoff B without limiting any use, yet it shall be to the use of C.

Noy, 19, *per* Popham, C. J., in case of Yelverton v. Yelverton.

(K) Of second or shifting Uses.

If a man made a *feoffment in fee* before the statute of uses, 27 H. 8, c. 10, or after the statute, *to the use of W and his heirs till A paid* 40*l.* to the said W, and *then to the use of the said A and his heirs*, and after comes the statute of uses and executes the estates in W, and after A *pays* W the 40*l.*, there A *is seised in fee if he enters*, by several. But by some, A shall not be seised in fee by the said payment, unless the feoffees enter; *quære inde.* And therefore it seems to be the surest way to enter in the name of the feoffees, and in his own name, and then the one way or the other the entry shall be good, and it shall make A to be seised in fee: and therefore a man at this day may make a feoffment to uses, and the use shall *change from one to another by act ex post facto by circumstance*, as well as it should before the statute 27 H. 8, of uses.

Bro. *F. al Uses*, pl. 30, cites 6 E. 6.

So, if I limit a use *jointly to two persons not* in esse, and the *one comes to be* in esse, he shall take the entire use; and yet if the *other afterwards comes* in esse, he shall take jointly with the former.

Ld. Bacon on the Statute of Uses, 351. As, if I make feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I marry, my wife takes the whole use; and if I afterwards have a son, he takes jointly with my wife. Lord Bacon on the Statute of Uses, 351.

Where a conveyance was made by fine to A B *to the use of C D and M his wife for life*, and the longer liver of them, remainder after their decease to the *use of C's executors for six months*, and after the six months ended, to the use *of E and F, his wife, and the heirs male of their bodies*, remainder to C and his heirs, *provided if C at any time after have issue* of his body, or any wife of C at his decease be enseint with any issue begotten by C, *then after such issue had, and after* 500*l. paid to G* or tendered and refused, *within six months after the birth* of such issue, then the use of the said lands, immediately after the decease of the said C D and M the six months expired, shall be *to C and the heirs of his body, and in default of such issue, to the right heirs of the said C D;* M dies, and C marries N. *Per* Plowden and Dyer—Before the performance of the contingent, C has no larger estate than he had before.

Dy. 314, pl. 96, Anon.

So, where A made a feoffment to the use of *himself for life*, remainder to his *wife for life*, remainder to his right heirs, with a *proviso* if his son interrupted his wife, it should be *to the use of the wife and her heirs:* A made a lease for years, to begin after (*a*) his decease, and died: The son disturbed the wife; Resolved, that the use will not arise to give the wife the fee.

Cro. Eliz. 766, case of Wood v. Reynolds, cites it as the case of Leigh v. Burton. And Godfrey, *Arg.* said, he conceived the reason thereof to be, because the use limited to the right heirs was the ancient reversion, and no new estate, and a condition cannot be annexed thereto. Ibid.——Mo. 742, pl. 1022. Barton's case says, it was to begin after the (*a*) wife's decease. Resolved, by Popham and Anderson, C. J., clearly, that the future use was checked by the lease, and never shall arise; for since it could not arise at the death of the wife, by reason of the lease for years, it is destroyed for ever.

Yet *notâ*, (says the reporter,) that the lease was only an *interesse termini* all the time of the wife's life, and the disturbance which ought to raise the use in fee to the wife, was made in her life, before the commencement of the lease.——Gilb. Law of Uses, &c., 138, 139, cites S. C.; and says, the wife shall not have the reversion, because the lease has altered it; for there is the same estate to be executed in the wife as was in being at the disposition of the particular estate.

Likewise, where A *bargained and sold land to B and his heirs* for 500*l.*, *upon condition* that *if A paid B* 500*l.* he might *re-enter and be seised to the use of himself and his heirs, until* he attempt to alien without the assent of B, *and then to the use of B and his heirs*, and a *fine* was levied to those uses: A paid the 500*l.* and entered; afterwards A aliened to J S without the assent of B. *Per* Lord C. Egerton,—No use will arise to B, because B, entering for the condition broken, ought to be in of the old use and estate, and cannot be seised to any other use.

Moor, 761, pl. 1054, in Chancery, Holloway v. Pollard.

‖Provisoes defeating estates actually created are commonly introduced in settlements, where it is wished that on accession of another estate, the one settled shall go over to another branch of the family, and the validity of such provisoes is now well established.

Thus, Thomas Heneage devised his estate to trustees, to the use of his son G. F. Heneage for his life, remainder to the use of trustees, to support contingent remainders during the life of the said G. F. H., and to permit G. F. H. to receive the rents during his life, remainder to the first and other sons of G. F. H. successively in tail-male, remainder to devisor's son J. Heneage for life, remainder to trustees, &c., remainder to J. Heneage's sons in tail successively, remainder to the third and other sons of the devisor in tail, with an ultimate remainder to the devisor's right heirs—*Provided*, that in case it should happen that G. F. Heneage, or any of his sons, should ever inherit or take the estate of testator's brother, George Heneage, or so much thereof as should exceed the devised estate by 100*l.* *per ann.*, then the uses and estates thereby limited in favour of G. F. Heneage, or any son of his, should cease, determine, and be void; and in such case, his will was, that the next in remainder, according to the uses of that his will, should succeed to and enjoy his said estate thereby devised, as if his said son G. F. Heneage, or any such son or sons of his, was or were respectively dead. On the testator's death, G. F. Heneage entered on the premises, and enjoyed the same till his death in 1782. George Heneage, the devisor's brother, died in 1753, leaving a will, whereby he devised his estates (exceeding in value the estates devised by Thomas Heneage by 100*l.* and upwards) to his nephew, G. F. Heneage, for life, with remainder to his first and other sons in tail; and on his uncle's death, G. F. Heneage entered upon the estates of his uncle, and enjoyed the same till his own death in 1782, when he left issue the defendant his eldest son, and the lessor of the plaintiff, his second son. At the time of his uncle's death, G. F. Heneage had no son; but the defendant and the lessor of the plaintiff were afterwards born. Thomas Heneage, the son of the testator Thomas Heneage, died unmarried, and without issue, in the lifetime of George Heneage; and the devisor, Thomas Heneage, had no other son. The ultimate limitation in the will of Thomas Heneage was vested in G. F. Heneage, as heir of his father, Thomas Heneage, at the death of George Heneage the uncle. On the death of G. F. Heneage, the defendant, his eldest son, took, under the devise in G. H's, the

uncle's, will, an estate in tail-male in his uncle's estates, and was still in possession thereof. Upon the death of G. F. Heneage, the defendant as his heir also entered upon the premises in question, and was still in possession thereof. For the defendant, it was contended, that G. F. Heneage having had no son at the time of his uncle George's death, when he became entitled to his uncle's estates, there was no person then *in esse* to take under the contingent use limited by the will of Thomas Heneage, and, consequently, that the use was void, and the defendant was entitled as heir at law to the devisor, his grandfather; but the Court of King's Bench held, that, under the limitation to trustees to preserve contingent remainders during the life of G. F. Heneage, their estate continued during the whole life of G. F. H., and, consequently, preserved the contingent uses to his son.

Doe dem. Heneage v. Heneage, 4 Term R. 13.

In the above case, effect was given to the limitation to trustees during the life of G. F. Heneage, in order to effectuate the clear intention of the testator,—that his estate, and that of his brother George, should not unite in the same son of G. F. Heneage. But *where there was a person in esse* to take the contingent use at the time of the determination of the particular estate, the same words in a will were construed not to give the trustees an estate during the whole life of the particular devisee, since such a construction would, in that case, defeat the clear intention of the testator. The case was:—Sir W. Carr, Bart., devised estates to trustees to the use of his grandson, W. Hay, second son of his daughter the Countess of Erroll, for life, subject to the provision after mentioned, with remainder to trustees during the life of W. Hay to preserve contingent uses thereafter limited, but to permit W. Hay to receive the rents and profits during his life, remainder to the use of the first son of the body of W. Hay, and then to his second, third, fourth sons, &c., in tail-male, subject to the provisoes, &c.; and in default, &c., to the use of the third, fourth, and fifth, and every other son of the Countess of Erroll in tail-male, subject to the provisoes, &c.; and in default, &c., to the use of the second son of George Lord Hay, testator's grandson, and the heirs male of his body, subject to the provisoes, &c.: and in default, &c., to the use of the third, fourth, fifth, and other sons, of the said George Lord Hay in tail-male, subject, &c.; and in default, &c., to the use of his grand-daughter Lady Charlotte Hay (afterwards Lady C. Carr,) for life, subject to the provisoes, &c., with remainder to trustees, to preserve contingent remainders, remainder to the first son of Lady C. H's body, and his heirs male, &c., subject to the provisoes, &c.—*Provided* that, in case his grandson W. Hay, or his first or any other son, or the issue male of their bodies, or the third or any other son of Lady Erroll, or other issue, or the second or any other son of G. Lord H., or their issue, or his grand-daughter Lady C. H. or their respective first or any other son, or the issue male of their respective bodies, or any of them, should become entitled to the said estates, and the person so entitled should afterwards become entitled to the earldom of Erroll, then, and from thenceforth, the use and estate thereby limited to such person so becoming entitled, should cease and be void as if such person were dead without issue; and the estates thereby devised should go and remain to the use of the person next in remainder, to such person so becoming entitled as aforesaid. At the decease of the testator, his grandson William Hay, the second son of Lady Erroll, was an infant; but, on his attaining

twenty-three years of age, he was let into enjoyment of the mansion-house and estates devised. George Lord Hay, the eldest son, became, at his father's death, Earl of Erroll, but he died without issue; and thereupon William Hay became, and then was, Earl of Erroll. The testator's daughter, the Countess of Erroll, having no other issue male except the said William Earl of Erroll, the defendant Lady Charlotte Hay, the testator's grand-daughter, named in the will, (who had intermarried with W. Holwell Carr, clerk,) claimed to be entitled to the possession of the estates, as if her brother William Earl of Erroll was dead without issue male; and, on her death, she left a son, the present plaintiff, an infant. The defendant, W. Earl of E., insisted that the estates were vested in the trustees, to preserve contingent remainders, for the benefit of himself during his life. For the plaintiff, it was contended, that, on the event which had happened, of the title of Earl of Erroll devolving upon William Hay, the plaintiff took an estate-tail in possession, such devolution of the title being, by the proviso in the will, equivalent to the natural death of William Hay without issue male; and that though the estate to the trustees was not, in words, made subject to the proviso, it must be so in effect; and that if W. Hay's life-estate was gone, it would be inconsistent to say, that the permission to the trustees to let him take the rents and profits during his life applied to the case. The Court of King's Bench, on a case sent by the Lord Chancellor, was of opinion, that the plaintiff, William Holwell Carr, was entitled to an estate in tail-male in the premises.

Carr v. Earl of Erroll, 6 East, 75; and see Nicholls v. Sheffield, 2 Brown, C. C. 215; Stanley v. Stanley, 16 Ves. 494; Gilb. on Uses, by Sugden, 153, *notâ*.‖

(L) Of the Manner of pleading Uses.

If a man pleads that A, B, and others were seised to his use in fee, this is good pleading, without showing the commencement of the use.

Bro. *Pleadings*, pl. 170, cites 13 H. 7, c. 18.

But it is otherwise, where he says that they were seised to the use of him and the heirs of his body, because this is a particular estate.(*a*)

Bro. *Pleadings*, pl. 170, cites 13 H. 7, c. 18. ‖(*a*) That the commencement of estates-tail and all particular estates must be shown in pleading, unless when alleged by way of inducement. See Co. Lit. 303 b; 2 Salk. 562; 3 Wils. 72; Rast. Ent. 356.‖

If a man makes a feoffment in fee to A to the use of B, B may plead this feoffment, and show that J S disseised him without laying any *actual entry*, for the statute executes the possession in him: he may also plead it without showing any agreement thereto, because the freehold is in him, unless he disagree, and then it must be shown on the other side, for thereby the freehold is immediately out of him.

Owen, 86, Green v. Wiseman; Gilb. Law of Uses, 81.

But in trespass he must show an actual entry; for this action is grounded on the disturbance of his possession, or the violation of his right, by taking the actual profits, which no man could hinder him from, or disturb him in, till he shows he was in possession.

Owen, 87, Green v. Wiseman.

If a man pleads that he bought land for 20*l*., without showing the money paid, or a day alleged for the payment of it, this is good; for the buying implies payment of the money; and if there was none paid, the plaintiff may reply, that he did not buy, &c.

Bro. *F. al Uses*, 338 b, pl. 15.

In debt the plaintiff counted upon a lease for years made by his father, rendering rent. The defendant said, that the father and others were seised in fee to the use of the father, *absque hoc* that the reversion descended to the plaintiff. And it was held a good plea to the count, for the plaintiff ought to have counted specially that they were seised to the use, &c., and that the father leased, and because he did not, the writ and count shall abate; *per* Rede, C. J., and Kingsmill, J.; for, *per* Rede,—The defendant may say that the father had nothing at the time of the demise, and then the plaintiff cannot maintain the declaration by the use, but it is a *departure;* for he ought to have shown it at first.

Bro. *Count*, pl. 49, cites 21 H. 7, c. 25.

The tenant of the land cannot plead a release made by *cestui que use* to the feoffee, without showing the release.

Bro. *Monstrans de faites*, &c., pl. 61, cites 14 H. 8, c. 4.

In waste, the writ set forth a feoffment to several persons to several uses. After verdict, exception was taken to the writ, because it did not say the feoffment was to them and their heirs, without which there could be no inheritance in *cestui que use*, and so no disherison, as the action of waste imports. But the plaintiff had judgment, because all the forms of the writs had been so since the making of the statute; and the declaration laid the seisin in fee, as it must; and yet the plaintiff might have had a general writ, and declared specially.

Hob. 84, pl. 112, Sheat v. Oxenbridge.

We proceed now to treat more particularly of the latter branch of this title, and to consider the law respecting

℘PART II.—OF℘ TRUSTS.

A TRUST is a right to receive the profits of the land, and to dispose of the land in equity; *per* Pemberton, *Arg.* Mod. 17, in the case of Smith v. Wheeler. And holding the possession and disposing thereof at his will and pleasure, and making leases thereof when the legal estate is in others, are signs of a trust.

1 Mod. 27, Smith v. Wheeler; Ibid. 38, *Arg.* in S. C.; Chan. R. 52, Earl of Newcastle v. Earl of Suffolk. ℘As to what will constitute a trust, see Foy v. Foy, 2 Hayw. 131; Elliott v. Armstrong, 2 Blackf. 198; Fisher v. Fields, 10 Johns. 494; Benzien v. Lenoir, 1 Car. Law Repos. 508; Taylor v. Mayrant, 4 Desaus. 505; Chamberlain v. Thompson, 10 Conn. 243; Dey v. Dunham, 2 Johns. Ch. 182; S. C. 15 Johns. 555; Rutledge v. Smith, 1 M'Cord, Ch. 119; Letcher v. Letcher's heirs, 4 J. J. Marsh. 593; Rutherford v. Ruff, 4 Desaus. 350; Smith v. Executor of Smith, 1 M'Cord, Ch. 134; Armstrong v. Campbell, 3 Yerg. 201; Donalds v. Plumb, 8 Conn. 447; Page v. Broom, 4 Russ. 6; S. C. 2 Russ. & Ry. 214; Wright v. Atkyns, Turn. & Russ. 157; Maccubbin v. Cromwell's ex'ors, 7 Gill & Johns. 157; Rainsford v. Rainsford, Rice's Eq. R. 343; De Bevoise v. Sandford, 1 Hoff. 192; Sheldon v. Sheldon, 13 Johns. 220; Johnson v. Fleet, 14 Wend. 176; Jackson v. Moore, 6 Cowen, 706; Ingles v. The Trustees of the Sailors' Snug Harbour, 3 Pet. 119; Bull v. Bull, 8 Conn. 47; Chamberlain v. Thompson, 10 Conn. 243; Homer v. The Savings Bank, 7 Conn. 478; Cowles v. Whitman, 10 Conn. 121; Dean v. Dean, 6 Conn. 285; Peebles v. Reading, 8 S. & R. 492; Graham v. Donaldson, 5 Watts, 451; Hoge v. Hoge, 1 Watts, 163; Smiley v. Dixon, 1 Penns. 441.℘

Of Trusts.

Trusts are of the same nature now that uses were at common law. *Arg.* Allen, 15, in case of The King v. Holland.

Allen, 15, The King v. Holland; Abr. Eq. Case, 220, S. P. Symson v. Turner.—— S. P. *Arg.* Vent. 130, in case of Smith v. Wheeler.——A trust is but a new name given to a use, and invented to defraud the statute of uses.* *Arg.* Sti. 40, in case of The King v. Holland. ℔ Fisher v. Fields, 10 Johns. 495.℔

* It has already been observed, that now the use by the way of trust (which were one and the same before the statute) remains separately in some persons, and the possession separately in others, as it did before the statute, and are not brought together but by decree in Chancery, or the voluntary conveyance of the possessor of the land to *cestui que trust.*

[The legislature, by the stat. of 27 H. 8, c. 10, are thought by Lord Coke (1 Rep. 125) to have intended to abolish uses and trusts, though this opinion is controverted by Lord Bacon in his Readings on the Statute. If such was the intention, courts of law, by too strict a construction of its provisions, defeated it, and rendered it necessary for courts of equity to retain that jurisdiction, of which a more liberal interpretation of the statute by courts of law would probably have deprived them; so that, as Lord Hardwicke observed, "A statute made upon great consideration, and introduced in the most solemn manner, by a strict construction, has had no other effect than to add at most three words to a conveyance." Courts of equity have, however, in the exercise of this jurisdiction, wisely avoided, in a great degree, those mischiefs which made uses intolerable. They now consider a trust-estate (either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to the same charges in equity, except dower, to which the other is subject at law: and by a long series of uniform determinations for a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds.

2 Fonbl. E. Tr. 15; 1 Atk. 591; 2 Black. Com. 337.]

℔ Trust-estates are subject to the same rules as legal estates, in every case, dower excepted.

Danforth v. Lowry, 3 Hayw. 68.℔

But for the better understanding of this head, we shall divide it into the following branches; and consider,

(A) By what general Rules Trusts are governed.

(B) What amounts to a Declaration of Trust, and when a Trust shall be raised.

(C) What shall be deemed a resulting Trust, or Trust by Implication.

(D) What shall be deemed an Advancement, and what a Trust.

(E) What Acts of a Trustee shall be a Breach of Trust, &c., or shall be deemed to alter or vary the Nature of it.

(F) What Acts of the Trustee jointly with *Cestui que Trust*, or by *Cestui que Trust* only, shall defeat the Trust, or destroy contingent Remainders.

(G) In what Cases Equity will decree Trustees to join in a Recovery, &c., with *Cestui que Trust.*

(H) When a Trust is to be executed, what Estate or Interest is to be conveyed, and to whom.

(I) Trustee in what Cases favoured, and in what Cases decreed to account.

(K) How far Trustees are answerable for each other.

(A) By what general Rules Trusts are governed.
(L) In what Cases Trustees shall give Security, and when be discharged or removed
(M) The Power of *Cestui que Trust.*
(N) Of Forfeitures by *Cestui que Trust.*
(O) Compensation to Trustees.
(P) Of Suits in Equity and Actions at law by and against Trustees and *Cestuis que Trust.*
(Q) Miscellaneous Cases.

(A) By what general Rules Trusts are governed.

Trusts and legal estates are to be governed by the same rules; and this is a maxim which has universally prevailed. It is so in the rules of *descent*, as in *gavelkind*, and *borough English* lands; there is a *possessio fratris* of a trust, as well as of a legal estate. The like rules in *limitations*, and also in *barring entails* of trusts, as of legal estates; *per* the Master of the Rolls, who said he thought there was no exception out of this general rule, nor is there any reason that there should; and that it would be impossible to fix boundaries, and show how far, and no farther, it ought to go; and that perhaps in early times the necessity of keeping thereto was not seen, or thoroughly considered.

2 P. Wms. R. 645, Sutton v. Sutton; Danforth v. Lowry, 3 Hayw. 68; Cudworth v. Hall's Adm'r., 3 Desaus. 261; Fisher v. Field, 10 Johns. 494. ‖See Cholmondeley v. Clinton, 2 Jac. & Walk. 1, 189.‖

A trust is now what a use was before the statute of uses. It is an interest resting in equity and conscience, and the same rules apply to trusts in Chancery as were formerly applied to uses.

Fisher v. Field, 10 Johns. 494.

[But there is a difference between trusts *executed*, and trusts *executory;* for though the former are construed in the same manner as legal estates; yet it is otherwise with the latter; for they are so moulded by the courts of equity, as best to answer the intent of the parties creating them. However, it must be acknowledged, that even with these, where it does not violate such intent, the same rule of construction is applied as to legal estates.

Lord Glenorchy v. Bosville, Ca. temp. Talb. 19; Garth v. Baldwin, 2 Ves. 655; Roberts v. Dixwell, 1 Atk. 608.]

A being seised in fee of certain lands devised them to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally: the younger married and died, leaving an infant son, and her husband surviving: the eldest daughter brought a bill for a partition; and the only question was, Whether the husband of the younger daughter should have an estate for life conveyed to him as tenant by the curtesy? Upon which it was decreed by Lord Chancellor, that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust estate; and if there were not the same rules of property in all courts, all things would be, as it were, *at sea*, and under the greatest uncertainty.

1 P. Wms. 108, Watts v. Ball. [So, Chaplin v. Chaplin, 3 P. Wms. 234; Cashborne v. Scarfe, 1 Atk. 603; Burgess v. Wheate, 1 Black. R. 138, 161.] ‖And the

husband shall have his curtesy of money agreed to be laid out in land, because in equity it is considered as land. Sweetapple v. Bindon, 2 Vern. 536; Cunningham v. Moody, 1 Ves. 174.‖

[But, where a father devised lands to trustees, in trust to apply the rents and profits to the sole and separate use of the daughter during her life, not subject to the debts and control of her husband, and also to permit his daughter by deed or writing to devise the lands to such persons as she should think proper; Lord Hardwicke held, that the husband should not be tenant by the curtesy of the trust; because, though the daughter had the benefit of a trust of inheritance, yet she had neither a legal nor equitable seisin during the coverture.

Hearle v. Greenbank, 3 Atk. 715; ‖*sed* vide 1 Atk. 607; 2 Bro. C. C. 51.‖

It is established, that there shall not be tenant in dower of a trust.

3 P. Wms. 234; 2 Atk. 525; Ca. temp. Talb. 138; ß Danforth v. Lowry, 3 Hayw. 68; Derush v. Brown, 8 Ohio, 412.ß

It hath also been holden, that a trust is not liable to escheat to the lord in consequence of attainder or want of heirs; because the trust could never be intended for his benefit.

Burgess v. Wheat, 1 Black. R. 123. ‖See Gilb. on Uses by Sugden, p. 17, note (10).‖

{A copyhold is devised to A and his heirs in trust for B and his heirs, B dies without heirs. Chancery will not compel the lord to admit the heir of the trustee, who is only entitled to a legal estate without any beneficial interest: Chancery has not jurisdiction to support the legal title by compelling the lord to admit.

3 Ves. J. 752, Williams v. Lord Lonsdale.

Bank stock was purchased in England by the government of Maryland before the American war, and vested in trustees in England, for the discharge of certain bills of credit. The last trustees appointed were Hanbury, Russel, and Grove. In 1779, the government of the state of Maryland passed an act for calling in the bills of credit; and the mode proposed was by giving to the holders bills of exchange drawn upon the trustees in London; and it was provided that those trustees should be discharged from the trust; they were directed to transfer the stock, and five persons resident in Maryland were appointed to be trustees of the stock in England in their place. That act having no effect, another was passed in 1780, directing bills to be drawn upon the trustees in England, and to be sold in America, and that in case the trustees should refuse to act, or should suffer the bills to be protested, or in case the British government should interfere, the holders of those bills should have a right to attach the property of the three trustees, each of whom had property in Maryland, and the property of Lord Baltimore's representatives. After the peace, the state of Maryland assigned part of the stock to the partnership in which Hanbury was a partner, as a compensation for a mortgage which they had on confiscated lands in Maryland, and under that assignment they brought a bill in Chancery. The fund, subject to that assignment, was claimed by the new state; and, there being no claim by the holders of the bills of credit, the whole was claimed by Grove, the surviving trustee, beneficially, and also by Mr. Harford, the devisee of Lord Baltimore, the proprietary; a specific lien was also insisted on by the representatives of Russel for the loss of property attached under the act of 1780, in consequence of the refusal of the trustees to transfer. Lord Loughborough decided that there was no

such lien: that the new state was not entitled to the fund, as it could take only such rights of the old as were within its jurisdiction; that it could therefore make no assignment to the plaintiffs: that the claims of the plaintiffs, the state, and the others were the subjects of treaty, not of municipal jurisdiction; and that this was the common case of a trust without any specific purpose to which it could be applied, and consequently the fund must be at the disposal of the crown.

3 Ves. J. 424, Barclay v. Russel. See 10 Ves. J. 352, Dolder v. Bank of England; 11 Ves. J. 294, Dolder v. Lord Huntingfield.}

Trusts in general are not barred by the statute of limitations. Thus, a trustee has been decreed to account and re-convey after a possession of twenty years.(*a*) So, where a trust is created for payment of debts, it will not only take a debt out of the statute of limitations, incurred *since* its creation,(*b*) but will also *revive* a debt barred by the statute before it was raised.(*c*) But this rule, that a trust estate is not within the statute of limitations, holds only as between *cestui que trusts* and *trustees*, not between *cestui que trust* and *trustees* on one side, and *strangers on the other*.(*d*) And it is said, that a fine and five years' non-claim will, in favour of a purchaser, bar a trust term, though *cestui que trust* be an infant.(*e*). So, if a trustee neglects to sue within the time prescribed by the statute of limitations, *cestui que trust*, though an infant, is bound by it.(*g*)

Sand. on Uses, 250. (*a*) Berrington v. Mason, Finch, R. 262; ß Prevost v. Gratz, 6 Wheat 498.ß (*b*) Norton v. Turville, 2 P. Wms. 144. (*c*) Blakeway v. Earl of Strafford, 2 P. Wms. 373; Jones v. Earl of Strafford, 3 P. Wms. 89; Lacon v. Briggs, 3 Atk. 107. (*d*) Llewellin v. Mackworth, 2 Eq. Ca. Abr. 579; Townshend v. Townshend, 1 Bro. Ch. R. 551; ‖15 Vin. 155, pl. 1; Cholmondeley v. Clinton, 1 Meriv. 257; 2 Jac. & Walk. 1, 189; and see 1 Sand. on Uses, 280.‖ (*e*) 3 P. Wms. 310, note (G). (*g*) Wych v. East India Company, 3 P. Wms. 309.]

ß Express trusts are not within the statute of limitations; implied trusts are.

Shelby v. Shelby, 1 Cooke, 182; Lyon v. Marclay, 1 Watts, 275. See *antè*, *Limitation of Actions*, (D) 2, Vol. vi. p. 378; Maury's Adm'r v. Mason's Adm'r, 8 Port. R. 211; Allen v. Woolley, 1 Green's Ch. R. 209; Wisner v. Barnett, 4 Wash. C. C. R. 631; Prevost v. Gratz, 6 Wheat. 481; Boone v. Chiles, 10 Pet. 177; Walton v. Coulson, 1 M'Lean, 132.

Length of time is no bar to a trust clearly established. But a trust proving strong circumstances once to have existed, was presumed, after the lapse of forty years and the death of all the original parties, to be discharged and extinguished.

Prevost v. Gratz, 6 Wheat. 481, 504.ß

{ Where the equitable and legal estates unite in the same person, and are co-extensive and commensurate, the former is universally absorbed in the latter, and is wholly gone. Therefore, where the equitable estate descends *ex parte paterna*, and the legal estate *ex parte materna*, upon their union the maternal heir is entitled, and the paternal heir will not be relieved in equity

1 Bro. C. C. 363, Wade v. Paget; 3 Ves. J. 126, Phillips v. Brydges; Ibid. 339, Selby v. Alston; Doug. 771, Goodright v. Wells.

Where there is a devise to trustees to sell for the payment of debts, and to divide the surplus among several legatees, it is not necessary that those legatees should be parties to the conveyance.

3 Ves. J. 233, 504, Wakeman v. The Duchess of Rutland.}

ß A trust being an incident to the legal estate in lands, is of necessity

B) What amounts to a Declaration of Trust, &c.

destroyed or suspended by whatever destroys or suspends the legal estate. Therefore the lord by escheat, the abater, intruder, disseisor, and the like, are not subject to a trust.

Benzein v. Lenoir, Dev. Eq. 225.

A trust for the separate use of a woman, whether single or married, is valid.

Davies v. Thornycroft, 6 Sim. 420.

A secret trust will not be recognised. To entitle it to the protection of the court, it must be disclosed.

Hamilton v. Cummings, 1 Johns. Ch. 124.

Where a trust is created for the benefit of a person without his knowledge at the time, he may afterwards affirm the trust, and affirm the performance.

Moses v. Murgatroyd, 1 Johns. Ch. 119; Cumberland v. Codrington, 3 Johns. Ch. 261; Shepherd v. M'Evers, 4 Johns. Ch. 136; Neilson v. Blight, 1 Johns. Cas. 205.

The assent of creditors is not requisite to give legal validity to a deed of trust for their benefit.

Nicholl v. Mumford, 4 Johns. Ch. 529. See Neilson v. Blight, 1 Johns. Cas. 205.

When one of several trustees refuses to accept and execute the trust, the whole estate vests in the others, as if he were dead or had not been named as trustee.

King v. Donnelly, 5 Paige, 46.

It is a rule in equity, that if one comes into possession of trust property, with notice of the trust, he shall be considered a trustee, and, with respect to that property, bound to the execution of the trust.

Chaplin v. Givens, Rice's Eq. 132; Manning v. Gloucester, 6 Pick. 6; Stafford v. Rantoul, 12 Pick. 233.

And a trustee, with notice of his appointment as such, who interferes with the subject-matter of the trust, shall not be allowed to repudiate the trust.

Rice's Eq. R. 132.

If, at the time of the testator's death, there is any specific property in his possession which belongs to others, which he holds in trust, and it can be clearly traced or distinguished from the testator's own, such property is not assets for the payment of his debts, or to be distributed to his heirs, but it is to be holden as the testator himself held it.

Maury's Adm'r v. Mason's Adm'r, 8 Port. 212.g

(B) What amounts to a Declaration of Trust, and when a Trust shall be raised.

The statute of 29 *Car.* 2, *c.* 3, § 7, *enacts, That all declarations or creations of trust shall be manifested by some writing signed by the party, or by his last will in writing, or else shall be void.*

[It has been holden, that this provision does not extend to declaration of trusts of personalty. Nab v. Nab, 10 Mod. 404; *sed* vide Fordyce v. Willis, 3 Bro. Ch. R. 577.] ‖See Bayley v. Boulcott, 4 Russell, 347.‖

And by § 9, *Assignments of trusts shall be in writing signed by the party assigning the same, or by his last will, or else shall be of no effect.*

But words which are not *altogether artificial*, will serve to direct a trust, which will not serve to limit an estate; *per* Lord Keeper.

Fin. R. 159, Nourse et al. v. Yarmouth.

(B) What amounts to a Declaration of Trust, &c.

‖It is not necessary that the trust should be constituted by writing; it is sufficient to show by written evidence the existence of the trust.

Randall v. Morgan, 12 Ves. R. 74.‖ β The proof of a trust lies on the party who alleges it. Prevost v. Gratz, 1 Pet. C. C. R. 366.β

βA written acknowledgment by an executor of a trust created by parol, held to be a lien on the estate of the testator, conveyed by the executor or trustee to a voluntary purchaser with notice.

Rutledge's Adm'r v. Smith's Ex'r, 1 M'Cord's Ch. 119.

Parol evidence is admissible to establish a trust.

Letcher v. Letcher's heirs, 4 J. J. Marsh. 593.β

Where A devised all his lands to B and the heirs of his body; and in another part of his will, reciting that he owed B money upon account, he therefore devised to him all his personal estate, and made him executor, willing him to pay his debts; upon the reading of the will, though the clause as to the payment of debts seemed to relate to the personal estate only; and though the lands were devised to B in tail, with a remainder over to another, and it was objected, that a tenant in tail could not be a trustee; yet the court decreed both real and personal estate to be sold for payment of the testator's debts; and the decree, it is said, was affirmed in the House of Lords.

1 Vern. 411, Clowdesley v. Pelham.

So, if J S devises his lands to his brother, who is his heir at law, in fee, and likewise devises several legacies, and makes his brother executor, desiring him to see his will performed according to the trust and confidence he had reposed in him; this makes the real estate liable; for the testator needed not to have devised the estate to his brother, being heir at law, unless he intended that he should take it chargeable with the debts and legacies. Decreed, and affirmed by the House of Lords.

2 Vern. 228, Alcock v. Sparhawk.

A trust was decreed of a term for years assigned, though the trust was *not expressed in the deed;* it having been so declared by the assignee, who had given *bond to perform the trust.*

Fin. R. 356, Goodwin v. Cutler. [So where a bond was given to *cestui que trust* to assign as he should direct. Moorecroft v. Dowding, 2 P. Wms. 314. So, where a bond was given by a mother to her son to surrender a copyhold estate to him; the mother's brother, whose heir-at-law she was, having been disappointed of devising the estate to the son from the impracticability of surrendering it to the use of his will, and having taken this method of securing it to him. Parks v. Wilson, 10 Mod. 515; 9 Mod. 62, S. C.]

[A covenant to make conveyances, or to purchase lands to certain uses, hath been holden to be a good declaration of trust, and binding upon the estate.

Earl of Plymouth v. Hickman, 2 Vern. 167; Blake v. Blake, 2 Bro. P. C. 350; Deg v. Deg, 2 P. Wms. 415.]

‖Where a testator bequeathed a legacy to A and B, in trust for certain purposes, and on the same day a paper was signed by the trustees, declaring a trust for six named persons, and afterwards some lives were added by the testator, by which a seventh person was admitted to a share: on a bill filed by one of the six persons, the court recognised the paper as a valid declaration of trust, though not proved as a testamentary paper.

Smith v. Attersoll, 1 Russell's R. 266.

Where a mother, entitled to personal property under a will, in conversa-

tion with the executor, expressed an intention to make a settlement of part of that property which was standing in his name on her daughter, and requested the executor to instruct her solicitor to prepare such a settlement, and afterwards refused to sign such settlement when prepared, it was held that her intention expressed to the executor did not amount to a declaration of trust, though writing was not necessary, the property being personal.

Bayley v. Boulcot, 4 Russell, 345; and see 6 Ves. 663; 12 Ves. 39.

Where a debtor by a deed-poll directed, *inter alia*, the receiver of the rents of his estate to keep down the interest of a certain debt, Sir John Leach, M. R., held that the direction did not create a trust in favour of the creditor, if it was without consideration and without the privity of the creditor.

Page v. Broom, 4 Russell, 6.

If a man devises 1500*l.* to A and B, for such uses as the testator had declared to them, and by them not to be disclosed, and he discloses the trust to A, who by letter discloses it to B, this shall be a trust, and the letter is a good declaration thereof.

2 Vern. 106, Brooke v. Brooking; [2 Bro. P. C. 39, O'Hara v. O'Neill, S. P.]

But if a man devises 40*l.*, to be paid to his cousin J S, and by him to be disposed of in such manner as the testator should by a private note acquaint him with, and he dies without having made any such appointment, this shall be a good bequest to J S, and shall not go to the executors, from whom it was intended to have been given away.

1 Chan. Cas. 198, Martin v. Douch.

A lent B 100*l.*, and in the note which was given for it, mention was made that it should be disposed of as A should direct: on a bill exhibited for it, the court declared it was a *depositum* or trust, and decreed payment of it, though it was barred by the statute of limitations.

2 Vent. 345, Ld. Hollis's case.

A, in consideration of 80*l.*, conveys an estate absolutely to B, and afterwards A brings a bill to redeem, and B by answer insists that the conveyance was absolute, but confesses it was in trust; that after the 80*l.* paid with interest, he was to stand seised for the benefit of the wife and children of A, though no trust was declared in writing, and A replies to the answer. It was insisted, that A having replied, and defendant having made no proof of the trust, no regard ought to be had to the matter set forth in avoidance of the plaintiff's demand; yet the court decreed the trust for the benefit of the wife and children.

2 Vern. 288, Hampton v. Spencer; [2 Atk. 155, Cottington v. Fletcher, S. P.]

So, if J S makes his will, and his wife executrix, and the son afterwards prevails on his mother (by telling her that the executorship would be troublesome to her, &c.) to get J S to make a new will, and name him executor therein, he promising to be a trustee for the mother, which is done accordingly; and in that will there is but a small legacy given the wife, this will be decreed a trust for the wife on the point of fraud, notwithstanding the statutes of *frauds* and *perjuries*, which requires a declaration of trust in writing.

1 Vern. 296, Thynn v. Thynn. [1 Roll. Abr. 378, pl. 1; 4 Vin. Abr. 395, pl. 3, Roswell v. Every; 5 Vin. Abr. 521, pl. 31, Sellack v. Harris; Pr. Ch. 3, Davenish v. Baines; 2 Vern. 506, Oldham v. Litchford; Ambl. 67, Reech v. Rennigate; 3 Ves. jun. 152, Barrow v. Greenough; Anstr. 343, Newcomb v. Burdon. Similar decisions on the ground of fraud.] {And vide, 9 Ves. J. 519.}

But where one possessed of leases for years devised them to his wife, and hoped she would leave them to his son, and died; and her second husband granted the leases away, and the son sued to be relieved: his bill was dismissed, for it was no trust for the son.(*a*) Cited by Lord Chancellor as a case he remembered in Lord Egerton's time.

Chan. Cas. 310, Civil v. Rich. [(*a*) So other cases have said, that words merely *of recommendation* will not be sufficient to create a trust. Bland v. Bland, 24th February, 1745; Le Maistre v. Bannister, 26th November, 1770, stated in Finch's note to Eales v. England, Pr. Ch. 200; Cunliffe v. Cunliffe, Ambl. 626. However, notwithstanding these decisions, it now seems to be settled, that words of desire, request, or recommendation (for request and recommendation are considered as convertible terms) are sufficient to create a trust, provided that the property be certain, and the objects distinctly marked. Where any person gives property, and points out the objects, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it. Eales v. England, Pr. Ch. 200, 2 Vern. 486; Glynn v. Harding, 1 Atk. 469; Vernon v. Vernon, Ambl. 4; Palmer v. Scribb, 8 Vin. Abr. 289, pl. 25, Harland v. Trigg; 1 Bro. Ch. R. 142; Nowlan v. Nelligan, Ibid. 489, Pierson v. Garnett, 2 Bro. Ch. R. 38, 226; Richardson v. Chapman, Burn's E. L. tit. *Bishop*, p. 220; Massey v. Sherman, Ambl. 520; Wynne v. Hawkins, 1 Bro. Ch. R. 179; Malim v. Keighley, 2 Ves. jun. 333; Barrow v. Greenough, 3 Ves. jun. 152. In Pushman v. Filliter, 3 Ves. jun. 7, where a testator gave the residue of his personal estate to his wife, desiring her to provide for his daughter A out of the same, as long as she, his wife, should live, and at her decease to dispose of what should be left among his children, in such manner as she should judge most proper; upon a bill filed by the children against the wife's representative to have the benefit of this residuary bequest, the Master of the Rolls said, that it is now clearly settled, that any words of recommendation by any person having a right to command, do create a trust, if the person and property are defined; but the question in this case, he added, is merely a question of construction upon the words, "what should be left; and those words he construed to convey an absolute gift to the testator's wife of any part of his property to any use she might think proper, clothed only with a trust for his daughter A.] ‖ And see 1 Sand. on Uses, 317, (4th ed.,) and cases there collected; and tit. *Legacy*, (B,) Vol. vi. p. 166.‖

[An estate was devised to a body corporate in trust to sell, and that the money arising from the sale, and the receipt and profits till the sale, should be divided between the testator's nephews and nieces. The question was, Whether the devise to the corporation being void, the heir at law took beneficially, or subject to the trust? And by Eyre, B.—Although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself upon any estate the law may raise. This is the ground on which courts of equity have decreed in cases where no trustee has been named. Decreed, that the heir at law is a trustee to the uses of the will.

Sonley v. Clockmaker's Company, Bro. Ch. R. 81.]

‖ Where a testator by a codicil required and entreated the executor and residuary legatee, by will or deed, to settle and secure the sum of 500*l.*, to be paid at his decease, to his relation Mrs. Elizabeth Taylor, wife of Mr. Taylor, to be paid at the executor's decease, the testator declaring that he had omitted to express it in his will, not doubting that the executor would comply with his request, it was held a trust by way of legacy out of the assets, and not a condition imposed upon the executor independent of assets.

Taylor v. George, 2 Ves. & Bea. 378.

Where the testator gave to his wife A C 500*l.*, and declared it was his will and desire that A C might dispose of the same amongst her relations as she by will might think proper, it was held a trust for the relations for A C; and the 500*l.* was held well bequeathed by the will of A C to her

sister and her sister's children, though made without reference to the will of the first testator.

Forbes v. Ball, 3 Meriv. 437; and see 1 Sim. & Stu. 387, and the cases under *Legacy*, (B), Vol. vi. p. 166.‖

With respect to the raising of trusts, it has been held, that where a trust is created by marriage settlement or will, or a trust of a term to raise money at twenty-one or marriage, and the person dies b fore the time, a court of equity will not suffer the trustee to raise the money at law.

MS. Rep. Fry v. Fry, in Chan. Trin. 27 G. 2.

A by his will devised his real estate to his wife for life, with remainders over, and gave a legacy to his daughter, to be paid within one month after the death of his wife, and charged it upon the real estate. The daughter died in the life of the wife, unmarried; and after the wife's death the representative of the daughter brought his bill to have this legacy paid out of the real estate. For the plaintiff it was insisted, that this was different from the common case of a legacy payable out of the lands; for here the time of payment was postponed out of regard to the circumstances of the fund, and not of the person. But by Lord Chancellor,—The general rule is, that where a legacy or portion is given to be raised out of lands, payable at a certain time, if the legatee or child dies before that time comes, and before the time when, in the view of the testator, he could be supposed to want the legacy or portion, it shall sink in the land for the benefit of the heir or devisee; and this rule has only been broke into in favour of the husband or children of such legatee, &c., where she has married. But that is not the present case; and as to the argument made use of from the circumstances of the fund, that is only brought as an auxiliary reason; and no case has been determined upon such circumstances alone. If it had been given on a more remote contingency, as on the failure of issue of A, &c., there might have been some reason to have given it to the representative, as the testator might probably think the legatee could not be living at such a distant period. But here it depends on the death of his wife, which might happen in a reasonable time. In cases where it has been given to A, his executors and administrators, it shows the intention of the testator to make it transmissible: and where it has been charged by a condition, or a conditional limitation, and the legatee has had a remedy at law to defeat the devise of the estate to the devisee, this court will not interpose to take that remedy from him, but will leave the devisee to take the estate *cum onere*. But in the case of a trust created by marriage settlement or will, or a trust of a term to raise money at twenty-one or marriage, where the person dies before, this court will not suffer the trustee to raise the money at law, where there might be a remedy at law contrary to the rule of this court. The testator here, in the latter part of his will, gives legacies to his two daughters, and if either of them die, her share to go to the survivor; this looks as if he did not intend that the representative should have it even in the first bequest, and is a farther circumstance to confirm the opinion given against raising the legacy out of the real estate.—Bill dismissed, but without costs. If this had been the case of a child who had married, and left children, it might have been otherwise.

Fry v. Fry, in Chan. Trin. 27 Geo. 2, MS. Rep.

‖ If a testator expressly says he gives upon trust, and says no more, it has been long established that the next of kin will take. Then, if he

proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said he gave upon trust, and stopped there. Where a trust is clearly imposed, the trustee cannot take beneficially, though the trust may be too indefinite for execution.

See Morrice v. Bishop of Durham, 9 Ves. 399, 10 Ves. 537; Langham v. Sandford, 17 Ves. 435; Gibbs v. Rumsey, 2 Ves. & Bea. 297; Vesey v. Jamson, 1 Sim. & Stu. 69.‖

β The owner of a tract of land agreed to give a lot for the purpose of erecting a school-house upon it by contribution, for the benefit of the neighbourhood. Held that this created a trust for the purpose in those who contributed.

Martin v. M'Cord, 5 Watts, 493.

Where a purchase of land was made by A, who made an agreement before the purchase with B, that the latter should be equally concerned; held, that A in equity must be considered as holding for B and himself as tenants in common.

Stewart v. Brown, 2 S. & R. 461.

A bequest to A of "all the residue and remainder of my estate, of whatsoever kind the same may be, subject to the maintenance of my son B, during his natural life;" the residue consisted of personal estate; held, to create a trust for the benefit of B, and to make A the trustee.

Pierce v. M'Keehan, 3 Watts & S. 280.

When partnership funds are employed by a partner in the purchase of lands, and a deed is taken in his own name, a resulting trust will arise as to the other partners.

Phillips v. Crammond, 2 Wash. C. C. R. 441.

Declarations of a testator, made contemporaneously with the execution of his will, are sufficient evidence to establish his trust in the devisee, when fraud is alleged; and if the testator has executed his will on the faith of a promise by the devisee to perform the trust, the devisee shall be compelled to make it good.

Hoge v. Hoge, 1 Watts, 163, 215.

Testator directed that the profits arising from his share in a certain vessel should be paid to his wife for her use and for the bringing up of his two sons, and, after the lapse of a certain time, his interest in the vessel should be sold; and he then bequeathed the proceeds to his two sons, and appointed his friend, A B, "guardian in trust," to receive the money thus arising, and invest it on interest until his sons should come of full age. Held, that A B should be considered as a trustee, and not as guardian for the children.

Ex parte Potts, 1 Ashm. 340.

Where one directed a sum of money to be carried to a joint account of herself and the plaintiff, as trustee for the plaintiff, and the bankers gave her a promissory note for the amount, expressing that it was given to her as trustee, and was so entered on their books, which note after her death was received by her executors; held, that a trust was completely declared, and that the executors were trustees of the money received for the party in whose favour the trust was declared.

Wheatley v. Purr, 1 Keen, 551.

(C) Resulting Trust, or Trust by Implication.

A trust need not be created in writing. It is sufficient if it be proved under the hand of the party to be charged.

Second Unitarian Society v. Woodbury, 14 Maine, 281. See Jackson v. Sternbergh, 1 Johns. Cas. 153; Whelan v. Whelan, 3 Cowen, 537.

The holder of a note endorsed to him as security for a debt, recovered judgment against the promisor, and levied on the rents and profits of his land, for a term of years, signed a writing not under seal, promising to pay to the plaintiff all the rents he should receive after his debt should be paid, or allow the plaintiff the use and improvement of the land after such payment. Held that this constituted a sufficient declaration of trust.

Arms v. Ashley, 4 Pick. 71.

Where the owner of certain real estate gave a bond to secure the same to another, who entered thereon and received the rents and profits of the same: held, that this created a trust, or a sufficient declaration by the obligor that he held the estate in trust for the obligee.

Orleans v. Chatham, 2 Pick. 29.

Where two persons, A and B, sold personal property with the assent of its owner; took bonds in their own names from the purchasers; collected part of the money; proffered themselves ready to account for such sales; made a return thereof as trustees: a court of equity will infer some conventional arrangement between the parties, in the nature of a trust, which may be enforced in that court.

Ringgold v. Ringgold, 1 Har. & Gill, 11.

A deed of assignment of goods, which does not identify them, and refers only to a non-existing schedule, for a description of them, is invalid as a conveyance; but such a deed, containing a declaration of the trust, under which the goods were intended to be assigned, may be effectual to declare the trust.

Drakely v. Deforest, 3 Conn. 272.

A trust estate in real property, as separate from legal ownership, may be created by an express declaration of trust, or raised upon certain facts by implication of law.

Elliott v. Armstrong, 2 Blackf. 198.

(C) What shall be deemed a resulting Trust, or Trust by Implication.

It has been shown under the last head, that by the statute against frauds and perjuries, the 29 Car. 2, c. 3, all declarations of trusts were to be made in writing; but there is a saving in the act with regard to trusts resulting by implication of law, which are left on the footing whereon they stood before the act; now a bare *declaration by parol* before the act, would prevent any resulting trust. *Arg.* and the court seemed to be of that opinion.

2 Vern. 294, pl. 285, Lady Bellasis v. Compton and Frankland. [That parol evidence is admissible to rebut a resulting use is fully established by the case of Lord Altham v. Earl of Anglesea, 2 Salk. 676; Dougl. 26.] ‖Finch v. Finch, 15 Ves. 43; Bartlett v. Pickersgill, 1 Eden R. 515.‖

It was likewise ruled by Lord Chan. Cowper, that the statute of frauds, § 8, which says, "that all conveyances where trusts and confidences shall arise or result by implication of law, shall be as if that act had never been," must relate to trusts and equitable interests, and cannot relate to a use which is a legal estate.

1 P. Wms. 112, Lamplugh v. Lamplugh.

If a man purchases lands in another's name, and pays the money, it

will be a trust for him that paid the money, though there be no deed made declaring the trust thereof; for the statute of frauds and perjuries extends not to trusts raised by operation of law.

2 Vent. 361, Anon.; 1 Vern. 366, S. P. Gascoigne v. Thwyng. Admitted: but there said, "that the proof must be clear that he paid the purchase-money." ‖ Finch v. Finch, 15 Ves. 43; Mackreth v. Symmons, Ibid. 350;‖ β Jackman v. Ringland, 4 Watts & Serg. 257; Doyle v. Sleeper, 1 Dana, 536; Letcher v. Letcher's heirs, 4 J. J. Marsh. 592; Perry v. Head, 1 A. K. Marsh. 47; M'Guire v. M'Gowen, 4 Desaus. 491; Elliott v. Armstrong, 2 Blackf. 198; Jenison v. Graves, 2 Blackf. 440; Forsyth v. Clark, 3 Wend. 637; Jackson v. Bateman, 2 Wend. 270; Jackson d. Feller v. Feller, 2 Wend. 265; Jackson v. Matsdorff, 11 Johns. 91; Jackson d. Kane v. Sternbergh, 1 Johns. Cas. 153; S. C. 1 Johns. 45, n.; Jackson v. Mills, 13 Johns. 463; Jackson v. Morse, 16 Johns. 197; g {10 Ves. J. 360, Rider v. Kidder; 1 Johns. Ca. 153, Jackson v. Sternbergh; 1 Johns. Rep. 45, n. S. C.; 3 Johns. Rep. 216, Foote v. Coldin.}

‖ In order to raise a trust of this kind, the fact of the ownership of the money should appear on the face of the deed, either by a recital, or by expressions which amount to a necessary implication or presumptive proof of it.(*a*) If, however, it be expressly stated in the conveyance that the money was paid by the nominal purchaser, and nothing shall appear to explain the nature of the transaction, then if in his lifetime such nominal purchaser shall by any note or memorandum, in writing,(*b*) or by his answer to a bill filed against him for a recovery thereof, (though he shall at the same time plead the statute of frauds,)(*c*) confess the purpose for which the purchase was made; or if, after his death, he shall leave any papers disclosing the real circumstances of the case,(*d*) in all these cases the court will raise the trust, even against the express declaration of the deed.

(*a*) 2 Vern. 168; Prec. Ch. 104; Kirk v. Webb, Ibid. 84; Denton v. Davis, 18 Ves. 499. (*b*) Bellamy v. Burrow, Ca. temp. Talb. 97; O'Hara v. O'Neil, 2 Eq. Ca. Abr. 745; Vin. tit. *Trust*, (E). (*c*) Cottington v. Fletcher, 2 Atk. 155; *sed* vide 4 Ves. 23. (*d*) Ryall v. Ryall, Ambr. 413; Lane v. Dighton, Ibid. 409.

If, indeed, upon a bill filed against him for a discovery, the nominal purchaser deny the facts by his answer, and insist upon the statute of frauds, it should seem that parol proof cannot be admitted to prove the trust.

Skett v. Whitmore, 2 Freem. 352; Newton v. Preston, Prec. Ch. 103; Willis v. Willis, 2 Atk. 71; Cooth v. Jackson, 4 Ves. 12; Rowe v. Teed, 15 Ves. 374; Evans v. Harris, 2 Ves. & Bea. 361; β Haines v. O'Conner, 10 Watts, 313.g

No rule is more certain than that if a man makes a conveyance in trust for such persons and such estates as he shall appoint, and makes no appointment, the resulting trust must be to him and his heirs. The trust in equity must follow the rules of law in the case of a use, and that it would be so in the case of a use is undoubtedly true; and that was Sir Edward Cleer's case in 6 Rep. *per* Lord Chancellor.

Fitz. Gibb. 223, Fitzgerald v. Lord Fauconbridge; {10 Ves. J. 527, 537.} ‖ Where a tenant for life of a college lease, having a power of appointment, renewed it in his own name, and his appointee died in his lifetime, it was held a resulting trust for the representative of the author of the power. 1 Ball. & Be. 45.‖

But trusts arising by operation of law have been but of *two* kinds, (first) either where the conveyance has been taken in the name of one man, and the purchase-money paid by another; or, (secondly,) where the owner of an estate has made a voluntary conveyance of it, and made a declaration of the trust with regard to one part of the estate, and has been silent with regard to the other {[1]} part of it.(*e*) *Per* Lord Chancellor.

Barnard. Rep. in Canc. 388, Lloyd v. Spillit. The reason why the court has al-

lowed a trust by operation of law to arise in the latter case, has been, that the party, by declaring part of the trust to be for another, and by saying nothing, with regard to the other part of it, shows his intention to be, that the other was to have only one part of the trust; and consequently he himself ought to have the benefit of the other part of it. These have been the only two instances of trust allowed of, to arise by operation of law, since the statute of frauds, unless there has been a plain or express fraud. Where there has been a fraud, in gaining a conveyance from another, that may be a reason for making a grantee in that conveyance to be considered merely as a trustee. *Per* Lord Chancellor, Ibid. {[1]} 2 Binn. 387, Lessee of Huston v. Hamilton.} [(*e*) We cannot help suspecting the fidelity of the reporter in this passage, as the Chancellor is not made to deliver himself with his usual precision and accuracy. For there certainly have been other cases, besides those which are here put by my Lord Hardwicke, wherein constructive trusts have been admitted. For instance, where there were three lessees under a church, and one of them surrendered the old lease, and took a new one in his own name, it was holden to be a resulting trust for them all. Palmer v. Young, 1 Vern. 276. ‖ Whether the principle extends to the purchase of the reversion expectant on the lease, see Randall v. Russell, 3 Meriv. 190; Hardman v. Johnson, Ibid. 347. The rule has been adopted by the legislature in several statutes relating to the redemption and purchase of land-tax. 39 G. 3, c. 108, § 8; 42 G. 3, c. 116.‖ So, if a guardian or trustee for an infant renew a lease, the renewed lease will be to the use of the infant. Whalley v. Whalley, 1 Vern. 484; Lee v. Vernon, 7 Bro. P. C. 432; {See title *Leases*, U.} ‖ Or to the trust of the old lease, whatever it may be. Holt v. Holt, 1 Chan. Ca. 191; Pierson v. Shore, 1 Atk. 480; Abney v. Miller, 2 Atk. 597; Edwards v. Lewis, 3 Atk. 538; Featherstonhaugh v. Fenwick, 17 Ves. 228; Brookman v. Hales, 2 Ves. & Bea. 45; Milner v. Harewood, 18 Ves. 259, 274. But if there be a guardian or trustee for an infant, to whom lands are descended or devised, but the title is really in a third person, and the trustee or guardian buy in the title of the third person, this shall not be a trust for the infant. Lesley's case, 2 Freem. 52; and see 1 Scho. & Lef. 123.‖ So, if a trustee purchase lands with his trust-money, and take the conveyance in his own name without declaring the trust; but reciting or otherwise admitting that the purchase was made with the profits of the trust estate, a trust will result for the person entitled to the profits. Deg v. Deg, 2 P. Wms. 414. ‖ See Perry v. Phillips, 4 Ves. 108; 17 Ves. 173. So, if two persons make a joint purchase in the name of one, it is a resulting trust for the other. Wray v. Steele, 2 Ves. & Bea. 388; Anon., 2 Vent. 361.‖ So, if a mortgagee, whose mortgage was taken in the name of a trustee, buys in the equity of redemption, in the name of the same trustee, without any declaration of the trust, yet there is a good resulting trust to the mortgagee. Acherley v. Acherley, 4 Bro. P. C. 67. So, if a term is created to pay debts, or devised for a specific purpose, after the debts paid, or purpose answered, there is a trust for the heir. Countess of Bristol v. Hungerford, 2 Vern. 645; Levet v. Needham, Ibid. 138. So, a grant of the next avoidance of a church to a person, without his privity, is a resulting trust for the grantor. Duke of Norfolk v. Brown, Pr. Ch. 80; 1 Eq. Ca. Abr. 381, pl. 4, S. C. Nor is there a resulting trust only in those cases where part of the estate only is disposed of or conveyed; for though the whole estate be conveyed, yet if it be for particular purposes, or on particular trusts, which by accident or otherwise cannot take effect, a trust will result; as, where a testator devises real estates to trustees to sell and convert into personalty for particular purposes specified in the will, and those purposes cannot be effectuated, the real estates, or the produce thereof, will in such case result to the heir. Cruse v. Barley, 3 P. Wms. 20; Randall v. Bookey, Pr. Ch. 162; Emblyn v. Freeman, Ibid. 541; Stonehouse v. Evelyn, 3 P. Wms. 252; Arnold v. Chapman, 1 Ves. 108; Digby v. Legard, Tr. 1774, reported in the note in 3 Cox's P. Wms. 22; Akeroyd v. Smithson, Ibid. and 1 Bro. Ch. R. 503; Robinson v. Taylor, 2 Bro. Ch. R. 589; Spink v. Lewis, 3 Bro. Ch. R. 355; *sed* vide Ogle v. Ogle, 1 Bro. Ch. R. 501. Neither is it universally true, as is observed by Mr. Fonblanque, (2 Eq. Tr. 122, note,) that what is not conveyed will result; as, where the grantor limits an estate for years to himself, and an estate to another, by way of use, upon a contingency which may not happen within the term of years, an estate of freehold will not result to the grantor. Adams v. Savage, 2 Salk. 679, *et suprà*.]

Where it plainly appeared upon the evidence of both sides, that the consideration-money paid on a purchase was the proper money of A, (though mentioned in the conveyance to be paid by B;) in such case, had

it not been for the statute of frauds, this would have been made a resulting trust; and B after A's death executing a declaration of trust, this plainly took it out of the statute. *Per* Lord Chancellor Cowper.

1 P. Wms. 323, Ambrose v. Ambrose. {But see 3 Johns. Rep. 216, Foote v. Colvin, that the trust may be proved by parol.}

Wherever there is a consideration there can be no resulting trust. But if a lease be made for years without a consideration, there will be a resulting trust to the lessor.(*a*)

[(*a*) But it should seem, that there can be no implied trust between a lessor and lessee; because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor; and therefore in that case, if there be any trust at all, it must be declared in writing. Pilkington v. Bayley, 7 Bro. P. C. 526. But between an assignor and an assignee there may be an implied trust. Hutchins v. Lee, 1 Atk. 447.] ‖ Where a term of years was created, and no trust of it declared, but the estate devised to tenants for life with remainder over, the court decided that there was no resulting trust of the term, but that it attended the inheritance. Sidney v. Miller, Coop. Chan. Ca. 206.‖

Where a daughter's portion was charged upon the father's land, she, at the request of her father, had released her interest in the land, to the intent that he might be enabled to make a clear settlement thereof upon his son. It was declared by the Lord Keeper, that if this was done by the daughter without any consideration, there would be a resulting trust in the father, whereby he should be chargeable to the daughter for so much money.

Freem. 305, Lady Tyrrell's case.

But where a trustee purchases lands out of the profits of the trust-estate, and takes the conveyance in his own name; though probably, if he cannot make other satisfaction for the misapplication, these lands may be sequestered, yet they cannot be decreed to be a trust for *cestui que trust*, any more than if A borrows money of B, and purchases land with it,(*b*) those lands are no trust for B, for it is *not* a trust in writing; and a resulting trust it cannot be, because that would be to contradict the deed, by *parol proof*, directly against the statute of frauds. But if this purchase had been recited to have been made with the profits of the trust-estate, this appearing in writing might ground a resulting trust. On appeal to the House of Lords, this decree was affirmed.

Ch. Prec. 84, pl. 77, Kirk v. Webb; [Show. P. C. 83. {Vide 2 Dick. 593, Wilson v. Foreman, and the remarks on it in 10 Ves. J. 519. Also 8 Ves. J. 46, Lord Chedworth v. Edwards.} (*b*) The result of the different cases upon this point is well stated by Mr. Sanders in his edition of Atkyn's Reports, 2 vol. 150, note (2); ‖ and see 1 Sand. on Uses, 322, (4th edit.)‖ [If the consideration-money is *expressed* in the deed to be paid by the person in whose favour the conveyance is taken, and nothing appears in such conveyance to create a presumption that the purchase-money belonged to another, parol proof cannot be admitted *after the death of the nominal purchaser* to prove a resulting trust; for that would be contrary to the Statute of Frauds and Perjuries. See the principal case; Walter de Chirton's case, Pr. Ch. 88; Heron v. Heron, Ibid. 163; Newton v. Preston, Ibid. 103; Gascoigne v. Thwyng, 1 Vern. 366; Hooper v. Eyles, 2 Vern. 480; Crop v. Norton, 2 Atk. 75.] ‖ But it seems now settled otherwise. See Lench v. Lench, 10 Ves. jun. 511; Sugd. Vend. 598; Sand. on Uses, 325.‖ [But if the nominal purchaser *in his lifetime* gives a declaration of, or confesses the trust, that takes it out of the statute. Ambrose v. Ambrose, 1 P. Wms. 322; Ryal v. Ryal, 1 Atk. 59. In Lane v. Dighton, Ambl. 409, there was evidence, in Mr. Dighton's own handwriting, that *the trust stocks had been sold, and the money laid out from time to time in the purchase of land.*] ‖ See Liebman v. Harcourt, 2 Meriv. 513.‖ [So, if it appears on the face of the conveyance (whether by recital or otherwise) that the purchase was made with money of a third person, that will create a trust in his favour. As in the principal case, Deg. v. Deg, 2 P. Wms. 414; Ryal v. Ryal, *ubi suprà;* Young v. Peachy, 2 Atk. 257.]

So, where a testator *empowered the executor to lay out the personal estate in land, and settle it on A and his heirs;* and the executor being about to purchase, told A's mother of it, and asked her consent, but took the conveyance in his own name, and *no trust in writing was declared;* but it was proved that he at several times *declared it must be sold to make A satisfaction;* yet the court (though inclined to decree a conveyance to A, the executor being dead insolvent) declared it could not, because there was *no express proof of the application of the trust money.*

Ch. Prec. 168, pl. 139, Halcot v. Markant.

{R. Sowden by marriage settlement covenanted to pay money to trustees to be laid out in the purchase of lands. He did not pay the money, but purchased, at a price but little above the amount of it, a freehold estate, which was conveyed to him and his heirs. And Lord Kenyon decreed that it should be subject to the trust, and said he conceived the principle established to be, that where a man is bound {1} to do an act, and he does what may enable him to do the act, it shall be taken to have been done by him with the view of doing that which he was bound to do.

1 Bro. C. C. 582, Sowden v. Sowden; C. T. T. 80, Lechmere v. Lechmere, S. P.; 3 P. Will. 211, S. C. {1} See 4 Ves. J. 108, Perry v. Phelps; 10 Ves. J. 516, Lench v. Lench.}

[It is a general rule, that where lands are devised for a particular purpose, what remains after such purpose is satisfied shall result to the heir at law of the testator. Thus if lands are devised to executors for payment of debts and legacies, after payment of debts and legacies, the executors will be trustees, as to the surplus, for the heir at law; (*a*) though the executors have no legacy, and the heir at law has an express one.(*b*)

(*a*) Hobart v. Countess of Suffolk, 2 Vern. 645. (*b*) Starkey v. Brooke, 1 P. Wms. 396. ‖ See Stanley v. Stanley, 16 Ves. 491; Chambers v. Brailsford, 18 Ves. 368; 2 Meriv. 25; Stansfield v. Habergham, 10 Ves. 273; 1 Sand. on Uses, c. 3, § 7.‖

So where A devised lands to trustees to sell, and to dispose of the money as he should appoint, and for want of appointment to his four nephews, A appointed several sums to be paid to different persons, which sums did not amount to the value of the land, it was holden that the surplus resulted to the heir.

City of London v. Garway, 2 Vern. 571.

So where A devised to his wife a rent-charge for thirteen years for payment of debts, and devised lands to his wife in augmentation of her jointure, it was holden that the surplus of the rent-charge, after the debts were paid, resulted to the heir.

Wych v. Packington, 11 Br. P. C. 372.

So, where a rent-charge was devised to be sold for payment of legacies to the amount of 800*l.*; but if the rent-charge sold for 1000*l.*, then an additional legacy of 100*l.* was given to B, and another of 100*l.* was given to C, it was holden, that if the rent-charge sold for above 800*l.* and less than 1000*l.*, the residue, above 800*l.*, would result to the heir at law, and not be divided between B and C.

Stonehouse v. Evelyn, 2 P. Wms. 253.

So, where A devised her real and personal estates to trustees in trust, to sell and pay debts, and to pay the residue to five persons, to be equally divided between them, share and share alike, (which words in a will create a tenancy in common, 1 P. Wms. 700, 2 P. Wms. 282;) and one of the re-

siduary legatees died in the lifetime of the testatrix, the court held that this was a resulting trust (as to the share in the real estate of the residuary legatee, who died in the testatrix's lifetime) for the benefit of the heir at law. And upon a similar bequest of personal estate, it seems the share of the legatee so dying would go according to the statute of distributions.

Digby v. Legard, 3 Cox's P. Wms. 22; Akerold v. Smithson, Ibid. S. P.; Sand. on Uses, 245; 1 P. Wms. 700; 2 P. Wms. 532.

So, where lands were devised to be sold, and part of the money arising by the sale was given to *charitable uses*, and the residue of *the money* was given over, it was holden that the part given in mortmain should result to the heir at law, and not go to the residuary legatees.

Gravenor v. Hallum, Ambl. 643; ‖Gibbs v. Rumsey, 2 Ves. & Bea. 294.‖

So, where a testator gave a legacy to his executors by name, and then devised his copyhold to A, he paying his executors 1000*l.*, and after payment of debts and legacies, gave the residue to a charity, it was holden that the 1000*l.*, being a charge on the real estate, and not well disposed of by reason of the mortmain act, the heir at law was entitled to it by way of resulting trust.

Arnold v. Chapman, 1 Ves. 108.

So, where the testator directed the rest and residue of his real and personal estates to be sold by trustees, and thereout to pay annuities and legacies, and then to pay the surplus to A B for her life; upon the death of A B it was holden, that so much of the surplus as arose from the real estate was a resulting trust for the heir at law, and the rest for the next of kin.

Robinson v. Taylor, 2 Bro. Ch. R. 589; {11 Ves. J. 87, Berry v. Usher, S. P.}

So, where a testatrix, having an estate which came to her *ex parte maternâ*, on her marriage conveyed the same to trustees to such uses as she should direct, with remainder to her own right heirs; and afterwards by will directed the estate to be sold, the money to be paid out of the funds, and the trustees to permit the husband to receive the interest for his life; and then, after deducting 3500*l.* to certain uses which vested in C D, and after paying 1000*l.* to A B, to pay the residue to three persons; and by a codicil gave her husband a power of appointing the 3500*l.* in case C D should marry without his consent; A B died in the testatrix's lifetime before the codicil made, but the testatrix took no notice thereof in the codicil; it was holden, that the 1000*l.* were to be considered as real and not personal estate, and resulted to the heir at law of the testatrix *ex parte maternâ*.

Hutcheson v. Hammond, 3 Bro. Ch. R. 128.

So, where a testator directed real estate to be sold, and the money arising from the sale to be invested in the funds, and then ordered the residue of his personal estate to be laid out in the funds, to remain there for ten years, and at the end thereof gave the same to his next of kin; the Chancellor held, that the next of kin in that case must mean next of kin at the time of the death; and the testator having but one brother who fell within that description, and he having died within the ten years, the legacy was lapsed, and so much as was produced by the real estate must revert to the heir at law of the testator, and so much as was personalty to the representatives of the brother.

Spink v. Lewis, 3 Br. Ch. R. 355.

So, where a testator devised his real and personal estate to his executor

in trust to pay debts and legacies, and afterwards gave the rest and residue to the executor, but declared, that the only purpose for which he devised his real estate was, that he might subject it to his debts; it was holden, that so much of the real estate as was not applied to the debts should go to the heir.

Halliday v. Hudson, 3 Ves. jun. 210.

‖So where B, Earl of Harborough, devised all his manors, advowsons, &c., to trustees to pay to the succeeding earl 1000*l.* *per annum* for life, and directed that the surplus rents during the life of the earl (annuitant) should be laid out in the purchase of lands, to be settled to such uses as the testator's other lands stood settled after the death of the said earl; and after the demise of the annuitant the trustees were to stand seised to the use of the first and second sons of the earl in tail successively with remainder over, the question was, Who was to present to the advowsons during the life of the annuitant? The Lord Chancellor determined that the trustees had no pretence of right, and that the right of presentation not being disposed of during the life of the earl (annuitant) resulted to the heir.

Sherrard v. Ld. Harborough, Ambl. 165; and see Townsend v. Bishop of Norwich, 1821, 1 Sand. on Uses, 330. And as to cases of resulting trusts, see Wright v. Wright, 16 Ves. 188; Nash v. Smith, 17 Ves. 29; Williams v. Coade, 10 Ves. 500; Hill v. Cock, 1 Ves. & Bea. 173; Maugham v. Mason, Ibid. 410; Hooper v. Goodwin, 18 Ves. 156.‖

But this rule, that where lands are devised for a particular purpose, after the purpose satisfied, there is a resulting trust for the heir at law, admits of several exceptions. Thus, Lord Hardwicke said, if J S devised lands to A to sell them to B for the particular advantage of B, that advantage is the only purpose to be served according to the intent of the testator, and to be satisfied by the mere act of selling, let the money go where it would; and that there was no precedent of a resulting trust in such a case. So, if A devised lands to J S to sell to the best price to B, or to lease for three years at such a fine, there could be no resulting trust to the heir of the testator.

1 Atk. 619.

Again, a testator devised to trustees to sell, and to dispose of the money arising by the sale, as they, or the major part of them, should think proper; he having previously intimated an intention of giving the money to charitable uses. Here the heir at law can have no resulting trust; for a man empowering others to sell may disinherit his heir, as well as by his own actual disposition. Nor can his trustees have any beneficial interest; for his giving his estates to persons whom he *names trustees* to such purposes as they, or the *major part* of them, shall judge fit, plainly shows he intended them no benefit, but only an authority.

Cook v. Duckenfield, 2 Atk. 562.

So, a testator devised to his cousin T M, by name, all his messuage, &c., *in trust* to sell for the payment of all his debts and legacies within a year after his death, and made him executor, but gave him no legacy, though he was as nearly related to him as his heir at law. It was holden by two Lords Commissioners against one, that there should be no resulting trust; for then the executor, who was taken notice of as his cousin, would have nothing but his labour for his pains.

Coningham v. Mellish, Pr. Ch. 31; 1 Eq. Co. Abr. 273, S. C. ‖See Dawson v. Clark, 15 Ves. 409.‖

(C) Resulting Trust, or Trust by Implication.

So, a testator by his will made his *dearly beloved* wife *sole heiress* and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure, and to pay his debts and legacies, and gave his brother (who was his next of kin and heir) five pounds. It was decreed, that the testator's wife was entitled to the premises devised for her own benefit, and that there was no resulting trust to the heir at law of the testator: that the devise, that the wife should be sole heiress of the real estate, did in every respect place her in the stead of the heir, and not as a trustee for him: that it was the plainer by reason of the language of tenderness and affection, his *dearly beloved wife*, which must intend to her something beneficial, and not what would be a trouble only: and what made it still stronger was, that the heir was not forgotten, but had a legacy of 5*l.* left him.

Rogers v. Rogers, 3 P. Wms. 193

So, a testator devised his real estate to his sister *in trust*, to sell, and with the produce of the sale to pay his debts and certain pecuniary legacies; and after payment of his debts and legacies, gave her the residue of his personal estate. Lord Talbot held, that there was no resulting trust for the heir; and that the sister should have the whole residue, after the sale of the estate, both of the money arising by the sale, and of the personal estate.

Mallabar v. Mallabar, Ca. temp. Talb. 78.

A testator devised the advowson of a church to his mother-in-law, willing and desiring her to sell and dispose of the same to Eaton College, and on their refusal, to Trinity College in Oxford; and on the refusal of both those Societies, to any of the Colleges in Oxford or Cambridge. It was decreed, that there was in this case no resulting trust to the heirs at law of the testator, but a devise of the beneficial interest to the testator's mother-in-law, with an injunction to sell to particular societies.

Hill v. Bishop of London, 1 Atk. 618. ‖See the cases collected in Mr. Sanders's note; and see 1 Sand. on Uses and Trusts, 333, (4th edit.)‖

A by his will gave all his real estate to trustees to sell and dispose of the whole, with his personal estate, for payment of his debts, legacies, and performance of his will; and gave several legacies, and, among the rest, 1200*l.* to be applied to charitable uses within the mortmain act; and then directed the trustees to place out all the residue of his estate and interest therein upon securities, and divide among several persons. The whole of the 1200*l.* being a void devise, the question was, Whether it should go to the heir at law, or to the residuary legatees? Lord Hardwicke was of opinion, that the money which should arise by sale of the real estate, was turned into personal by the testator, and so intended; and therefore the heir at law had no claim to it.

Durour v. Motteux, 1 Ves. 320.

A devise was in trust, among other things, to pay 4*l.* a year, arising out of real estate, to a charity. This charge being void by the statute of mortmain, it was holden that it did not go to the heir at law, but sunk for the benefit of the specific devise, as arising out of his estate.

Wright v. Row, 1 Bro. Ch. R. 61; {4 Ves. J. 811, Kennell v. Abbott; 12 Ves. J. 497, Baker v. Hall, *acc.*}

A devised freehold estates to trustees in trust by rents and profits, or by sale or mortgage, to pay debts and legacies which his personal estate should

not be sufficient to discharge, and subject thereto, in case T B should attain twenty-one, in trust for him and his heirs. It was contended, that the surplus profits of the estates, after payment of the annuities left by the will and the interest of the debts, were undisposed of until T B should attain twenty-one; and consequently, the heir at law was entitled to them. But the court held this a complete devise to the trustees until T B should attain twenty-one; and that the surplus profits, after the legacies, annuities, and interest of debts paid, should be applied to sink the principal of the debts.

Popham v. Lady Aylesbury, Ambl. 68.]

{The vendor of lands, even after he has completed the title to the vendee, has an equitable lien on the land for the purchase-money which remains unpaid, though there is no special agreement to that effect. A bargain and sale must be for money paid, otherwise it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee; and if part be paid, he is a trustee, as to that which is unpaid. This lien is good, not only against the vendee himself, but also against his heirs, or any claiming under him as purchaser with notice of the equity. And if the vendee becomes a bankrupt, his assignees take the land subject to the lien, even though they have no notice of it; for they take the land only as the bankrupt himself held it. The lien, however, will not exist, if it appears to have been the intention of the parties that there should be none{1}. As where the vendor takes a mortgage on the land for *part*, and a note for the residue; or where he takes a pledge of distinct property, as of stock, or a mortgage upon other land: for these circumstances show that the parties intended there should be no security, or that other property should be substituted as the security in the place of the land itself.

1 Vern. 267, Chapman v. Tanner; 3 Atk. 272, Pollexfen v. Moore; 9 Mod. 153, Charles v. Andrews; 2 Ves. 622, Walker v. Preswick; 2 Dick. 730, Smith v. Hibbard; 1 Bro. C. C. 301, Cator v. Bolingbroke; Ibid. 420, Blackburn v. Gregson; 6 Ves. J. 475, Austen v. Halsey; 9 Ves. J. 209, Trimmer v. Bayne; 3 Bos. & Pul. 183, Elliott v. Edwards; 2 Wash. 141, Cole v. Scott. {1} 2 Vern. 281, Bond v. Kent; 6 Ves. J. 752, Nairn v. Prowse. In Fawell v. Heelis, Ambl. 724, Lord Bathurst held that a vendor who executed a deed and took a *bond* for the purchase-money had no lien. *Sed quære;* and see the cases above referred to, and 2 Eq. Abr. 682, n., Gibbons v. Baddall; Sugden, 353—357.}

|| So, where a testatrix devised all her real estate to her cousins, M A and A J, their heirs and assigns for ever, subject nevertheless to and chargeable with the payment of several annuities, all of which annuities she directed to be paid quarterly; and she charged her real estate with the payment thereof; and she gave her personal estate to R A, E B, and G A, their executors and administrators, subject to and chargeable with the payment of her just debts and legacies, thereinafter mentioned; and gave the surplus rents of her estates to several persons, for their lives only; Lord Chancellor Eldon held, that on the intention to be collected from the whole context of the will, this was a beneficial devise to M A and A J in fee, subject to the charges, and not a resulting trust in favour of the heir, as to the surplus beyond the charges. His lordship said that the principles applicable to the case were very well settled. He adopted those of Hill v. The Bishop of London, as affording the grounds on which Lord Hardwicke proceeded; "but I will point out the nicety of distinction, as it appears to me, upon which this court has gone. If I give to A and his heirs all my real estate, charged with my debts, that is a de-

vise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of these two modes admits just this difference: the former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest."

King v. Dennison, 1 Ves. & Bea. 273. See Southouse v. Bate, 2 Ves. & B. 396, where the words of the will were held to give a resulting trust.

So, where there was a bequest of the residue of moneys, arising out of the sale of a real estate, and the residue of personal estate, unto trustees and executors, to be disposed of unto such persons and in such manner as they in their discretion should think proper, it was held that they had an absolute interest, and not a trust.

Gibbs v. Rumsey, 2 Ves. & Bea. 294; and see on this subject the cases of Attorney-General v. Wansey, 15 Ves. 231; Dawson v. Clarke, Ibid. 409; Wright v. Wright, 16 Ves. 188; Nash v. Smith, 17 Ves. 29; Sheddon v. Goodrich, 8 Ves. 481; Williams v. Coade, 10 Ves. 500; Hill v. Cock, 1 Ves. & B. 173; Maugham v. Mason, Ibid. 410; Hooper v. Goodwin, 18 Ves. 156.‖

β When title to land is taken in the name of one person and the money is paid by another, there is a resulting trust, which the law implies in favour of him who pays the money; and this fact may be established by parol evidence.

Jackman v. Ringland, 4 Watts & S. 149. See M'Guire v. M'Gowen, 4 Desaus. 491; Rotsford v. Burr, 2 Johns. Ch. 409; 3 A. K. Marsh. 477.

Where there is a resulting trust under a conveyance, it must arise at the time of the execution of the deed.

Rogers v. Murray, 3 Paige, 390.

A resulting trust cannot be raised against the intention of the parties.

White v. Carpenter, 2 Paige, 217.

If a joint purchase be made in the name of the co-purchasers, parol evidence is admissible to prove the fact, and he will be considered a trustee for a moiety for the other.

Powell v. The Monson and Brimfield Man. Company, 3 Mason, 347; 3 Litt. 399; 4 Desaus. 486.

But parol evidence of a resulting trust must be very clear to sustain the trust.

Snelling v. Utterback, 1 Bibb, 609.

A resulting trust is never raised in favour of a grantor, in opposition to the express terms of his conveyance.

Squire v. Harder, 1 Paige, 494; Leggett v. Dubois, 5 Paige, 114.

An attorney is bound to give sufficient advice to his client; and if any advantage or property come to him by his ignorance or the neglect of the attorney, he shall be trustee therefor for the benefit of the person who would be entitled to it, had he known and done his duty.

Bulkey v. Wilford, 2 Clark & Fin. 177. See Giddings v. Eastman, 5 Paige, 561.

A trustee cannot acquire an outstanding title to the trust property; and a conveyance to him in his own right will enure to him as trustee.

Morrison v. Caldwell, 5 Monr. 435; Morgan's Heirs v. Boon, 4 Monr. 297.

If one of several devisees in remainder buy in the particular estate, avowedly for the benefit of all the devisees, he holds that particular estate in trust for those in remainder.

Anderson v. Bacon, 1 A. K. Marsh. 51.

(D) What shall be deemed an Advancement, and what a Trust.

Chancery will relieve against a fraud, by converting the person guilty of it into a trustee for those who have been injured by such fraud.

Brown v. Lynch, 1 Paige, 47; Perkins v. Hays, 1 Cooke, 166. See 2 Clark & Fin. 177; Giddings v. Eastman, 5 Paige, 561.

If an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered a trustee for his principal.

Lees v. Nuttall, 1 Russ. & My. 53; S. C., Tam. 282; 1 My. & Keen, 819; 5 Paige, 561; 2 Clark & Fin. 177; Sweet v. Jacobs, 6 Paige, 355; Carter v. Palmer, 1 Irish Eq. R. 289.

If land be purchased by one party and the conveyance be made to another, a trust will result to the person paying the money.

Newton v. Morgan, 2 Harr. 225; Bank of the United States v. Carrington, 7 Leigh, 366; Henderson v. Hoke, 1 Dev. & Bat. 149.

But when the purchase is made, and the money paid by the same person, and the transaction involves nothing more than a violation of a parol agreement to purchase for another, equity will not decree the purchaser to be a trustee.

4 Watts & S. 149.

If one undertakes to procure a deed of land for another, who pays the consideration or purchase-money, in accordance with a previous agreement, but fraudulently takes the conveyance to himself, such agent may be compelled, by bill in equity, to convey the land to him who made the contract and paid the consideration.

Pillsbury v. Pillsbury, 17 Maine, 107.

A resulting trust cannot be claimed by a party who pays only a part of the consideration on the purchase of land conveyed to another, unless it be some definite part of the whole consideration, as one-third, one-half, or the like.

Sayre v. Townsend, 15 Wend. 647.

If an agent locate land for himself, which he ought to locate for his principal, he is in equity a trustee, and liable to account to his principal.

Massie v. Watts, 6 Cranch, 148. See Phillips v. Crammond, 2 Wash. C. C. R. 441.

Where the grantee in a conveyance of a tract of land, in an account between himself and the grantor, made out subsequent to the execution of the deed, had given the grantor credit for part of the proceeds of the land conveyed by deed; held, that this amounted to a declaration of trust.

Prevost v. Gratz, Pet. C. C. R. 364.ℊ

(D) What shall be deemed an Advancement, and what a Trust.

It is a settled rule, that whenever a father purchases in the name of a child unprovided for, it is intended as a provision, and not a trust, unless it be otherwise proved, and the proof lies on the plaintiff. This was held so before the statute of frauds, &c., and is stronger since, because declarations of trusts ought to be in writing; though in other cases a trust will result where it appears that another paid the money.

2 Freem. 252, Shales v. Shales; ‖Glaister v. Hewer, 8 Ves. 199.‖ ℊWhen a parent purchases lands in the name of his child under age, it will be generally considered as an advancement. Jackson v. Matsdorf, 11 Johns. 91. See Stileman v. Ashdown, 2 Atk. 479; Hamilton v. Bradley, 5 Hayw. 137.ℊ

And a distinction has been taken where a parent makes a purchase in

the name of an unadvanced child, and where in the name of a child already advanced. In the former case, it was only an advancement for the child; in the latter, a trust for the parent.

2 Chan. Ca. 231, Elliot v. Elliot.

The reason why, where the father purchases *in the name of a son unadvanced*, without any express declaration of the trust, this is an advancement of the son, and not a trust for the father, is because between father and son *the blood is a sufficient consideration to raise a use* to the son; and that in all cases whatsoever, where a trust shall be between the father and son, contrary to the consideration and operation of law, the same ought to appear upon very plain, and coherent, and binding evidence; and not by any argument or inference from the father's continuing in possession, and receiving the profits, which sometimes the son may not in good manners contradict, especially where he is advanced but in part. And if such inference shall not be made by the father's *perception of profits*, it shall never be made from any words between them in *common discourse;* for in those there may be great variety, and sometimes apparent contradictions. Now, where there is no clear proof of any trust between the father and son, the law will never imply a trust, because the natural consideration of blood, and the obligation which lies on the father in conscience to provide for his son, are predominant, and must overrule all manner of implications. And herein the law of trusts does (as it ought to do) agree with the *law of uses before the statute* of H. 8; and therefore, if before that statute the father had made a feoffment to a stranger, without any consideration, the law raised a use without any implication to himself; but if he made a feoffment to *his son*, no use arose to the father by implication, because the blood, which is a sufficient consideration, fixed and settled the estate in the son. It is true, where the *son is married in the lifetime of his father, and by him fully advanced*, and in a manner emancipated, there a purchase by the father, and in the name of his son, may be a trust for the father, as much as if it had been in the name of a stranger, because in that case all presumptions or obligations of advancements cease. *But where* the son is not *advanced*, or but advanced or emancipated *in part*, in such case there is no room for any construction of a trust by implication; and without clear proofs to the contrary, it ought to be taken as an advancement of the son.

Finch, 338, Grey v. Grey; ‖1 Eq. Abr. 381; 2 Swanst. 594, S. C.; and see Redington v. Redington, 3 Ridg. P. Ca. 176.‖

‖ The son cannot, on his sick-bed, make a declaration of trust in favour of his father, so as to prevent his wife from having her dower of the estate. The evidence to repel the presumption of advancement must be contemporaneous with the purchase.

Bateman v. Bateman, 2 Vern. 406; Murless v. Franklin, 1 Swanst. 13.‖

So, where the father purchases in the name of the son, it has frequently been decreed an advancement, and not a trust, though the father takes the profits and keeps possession; and though the father, after such purchase, declares the trust, yet it is not good, unless the trust be declared before or at the time of the purchase; and so the Lord Chancellor agreed.

2 Chan. Ca. 231, Elliot v. Elliot.

Likewise, where a father purchased *in a younger son's name and a nephew's*, lands of inheritance; and also purchased a term for years (of which he himself had the inheritance) in the same son's and the father's mother's

name; though the whole purchase-money was mentioned to be paid by the father, and though he *took the profits* during his life, and died leaving the son about eight years old; and *though a reversion, expectant on his mother's death, was settled upon him*, yet the trustees disclaiming any interest in the estate, Lord Chancellor held the son to be *unprovided for, notwithstanding such reversion* after his mother's death; for that he might starve in the mean time; and that the *trustees* having *disclaimed*, made it all one as if the purchase had been in the son's name only.

1 P. Wms. R. 111, 112, Lamplugh v. Lamplugh. It was farther said in this case, that the father's taking the profits, must be intended to have been done by him as guardian to the son.

[A father purchased a copyhold in the name of the defendant, his eldest son, an infant of eleven years old, and enjoyed it during his life; and afterwards, having surrendered it to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for the defendant, who having recovered in ejectment, the bill was to be relieved against it. Lord Chancellor Jeffries conceived, that as he was but an infant at the time of the purchase, the purchase was an advancement for him, and not a trust, notwithstanding the father enjoyed it during his life.

Mumma v. Mumma, 2 Vern. 19.

So, where a father purchased a copyhold in his son's name, who was then eighteen years of age, and the father continued in possession till his death, Lord Hardwicke said,—I am of opinion it should be considered as an advancement for the son, and found my opinion greatly on the case of Mumma v. Mumma (*suprà*); and though two receipts are produced under the son's hand for the use of the father, I think that will not alter the case; for the son, being then under age, could give no other receipt in discharge of the tenants who held by lease from the father.

Taylor v. Taylor, 1 Atk. 386.]

But it seems it had been otherwise, if the father had taken *the profits after the child's coming of age*, and when of discretion to claim his right—

As, where A, a *grandmother, purchased an annuity in the* 14*l. per cent. annuities for lives, for* 100*l. in the name of E, her grand-child*, the father of E gave A, the grandmother, a bond to repay her the 100*l.* in case E should die in the grandmother's life; A kept the tally, and received the annuity during her life, and disposed of it by her will to F another grandchild; it was decreed by the Chancellor, that the receiving of the income, and keeping the tally, and *no claim having ever been made by* E, showed that E was but a trustee for A, and that the bond given by the father, in which no mention was made of a trust, did not make it to be so.

P. Wms. R. 607, 608, Loyd v. Read.

Likewise where a father purchases the reversion and inheritance in his own name of lands of which a lease for three lives was then in being, and afterwards purchases the lease for three lives in his son's name, it is decreed a trust, and not an advancement.

Finch. 373, Hodgkinson v. Moor.

[In the manor of H, it is the custom to grant copyholds for three lives *successivè*. S D purchased copyhold premises holden of this manor, and took the grant to himself and M, his wife, and W his eldest son, to take in succession for their lives.—By his will he devised all his interest in these copyholds (amongst others) to his youngest son. There were no other cir-

cumstances in this case; and the question was, Whether this was an advancement to W, or, whether he was a trustee for his father? The court, after full consideration, determined, that this was to be taken as an advancement for the eldest son.—The Chief Baron, in delivering the judgment of the court, observed, that in the cases cited the circumstance of the nominee being a *child* of the purchaser, had been considered as a *circumstance of evidence to rebut the resulting trust*, and not as *raising a consideration* in itself, which seemed a more simple way of treating it. That the circumstance of the custom of the manor requiring two nominees besides the purchaser had been insisted upon in the present case, as taking off the inference of an intended advancement, and had been relied upon in that view by the Lords Commissioners in Dickinson v. Shaw in Chancery, 22d May, 1770, in which case also the grant was for three lives *successivè*. But that, notwithstanding that authority, the court was of opinion, this circumstance was not sufficient to turn the presumption against the child.

Dyer v. Dyer, in the Exchequer, Nov. 1788, Cox's P. Wms. 112, note;] ‖ Watk. 216; 2 Cox, 92, Finch v. Finch, 15 Ves. 43; and see 2 Eden, 15.‖

But, where a purchase is made by a father in his own and his son's name, it shall *primâ facie* be intended an advancement for the son, and not presumed a trust, unless declared so.

Chan. Ca. 28, Scroope v. Scroope. It was said in this case, that it was anciently the way to join the son in a purchase, to avoid wardship.

[But this is a weaker case than where the purchase is made in the son's name only; and therefore the son shall not have the benefit of survivorship as against a judgment creditor of the father.

A father upon his son's marriage gave him a considerable advancement; and having several younger children who were unprovided for, he sold an estate; but 500*l.* only of the purchase-money being paid, he took security for the remainder in the name of himself and his son. The father received the interest and great part of the principal without any opposition from the son, as did his executrix after his death, the son writing receipts for the interest. A question being made, Whether the son should be considered as trustee for his father, or interested in his own right? Lord Hardwicke said,—No doubt, where a father takes an estate in the name of his son, it is to be considered as an advancement; but that is liable to be rebutted by subsequent acts. So, if the estate be taken jointly, so as the son may be entitled by survivorship; that is weaker than the former case, and still depends on the circumstances. The son knew here that his name was used in the mortgage-deed, and must have known whether it was for his own interest, or only as trustee for his father; and instead of making any claim, his acts are very strong evidence of the latter. Nor is there any colour why the father should make him any further advancement, when he had so many children unprovided for; and in using his son's name, the father might have a view that his son should be a trustee rather than another.

Pole v. Pole, 1 Ves. 76.

A bill was brought by an executor to have satisfaction out of the estate of the defendant's late father upon a judgment given by him to the plaintiff's testator. It appeared, that in 1700 the father made a small purchase jointly with the defendant to them and their heirs: that in 1708 he made another joint purchase with his youngest son, and settled it by way of provision for younger children, and paid the purchase money for both estates,

and continued in possession till his death, which happened in 1735. The sons afterwards entered upon these estates. It was insisted on the part of the defendants, that these two purchases were to be considered with respect to a moiety and on account of the survivorship, as an advancement of the sons, and, consequently, they were entitled to retain the estate, and not liable to the plaintiff's judgment. But Lord Hardwicke, after observing, that he thought the cases had gone full far enough in favour of advancements, and that he ought not to carry it further, said,—Here, the purchase is in the names of the father and son as joint-tenants: now this does not answer the purpose of an advancement, for it entitles the father to the possession of the whole till a division, and to a moiety absolutely even after a division, besides the father's taking a chance to himself of being a survivor of the other moiety: nay, if the son had died during his minority, the father would have been entitled to the whole by virtue of the survivorship, and the son could not have prevented it by severance, he being an infant. Suppose a stronger case, that the father had taken an estate in the purchase to himself for life, with remainder to his son in fee, should this prevail against the creditor? No, certainly; for the father having the profits for life, and the son only a remainder, the estate would have been liable. A material consideration for the plaintiff is, that the father might have other reasons for purchasing in joint-tenancy; namely, to prevent dower upon the estate, and other charges, &c. Then consider how it stands in respect of the creditor. A father was in possession of the whole estate, and must necessarily appear to be the visible owner of it; and the creditor too would have had a right by virtue of an *elegit* to have laid hold of a moiety, and so it differs extremely from all the other cases. Now, it is very proper that this court should let itself loose as far as possible, in order to relieve a creditor, and ought to be governed by particular circumstances of cases. I shall therefore decree the creditor in this case to be let in upon these estates.

Stileman v. Ashdown, 2 Atk. 477.] ‖See Hargr. Co. Lit. 246 a, n. (1).‖

‖ If a person purchase lands in the name of his wife, the wife shall not be a trustee for the husband.

Kingdom v. Bridges, 2 Vern. 67; Buck v. Andrews, Prec. Cha. 1; 2 Vern. 120.‖

β Where negroes were purchased and paid for by a debtor, and the title made to his sons, under the circumstances it was held that a trust resulted to the debtor in favour of creditors, and the negroes were liable for his debts.

Brown v. McDonald, 1 Hill's Ch. 306.*g*

(E) What Acts of a Trustee shall be a Breach of Trust, &c., or shall be deemed to alter or vary the Nature of it.

TRUSTS are so far regarded and supported in equity, that regularly no act of the trustee shall prejudice the *cestui que trust;* for though a purchaser for a valuable consideration, without notice, shall in no case have his title impeached in equity; yet the trustee must, especially in equity, make good the trust; and my Lord Hobart is of opinion, that an action lies against him at common law.(*a*) But if one purchases with notice, then he becomes the trustee himself, and shall be accountable for every act of his, as the trustee was; and if either become insolvent, the *cestui que trust* has his remedy against the other. The trustee of a legacy dying before

the legacy is paid shall nôt prejudice the legatee. So, if a trustee of land die without heir, though the lord by escheat will have the land at law, yet it will be subject to the trust in equity.(*b*)

1 Abr. Eq. Ca. 384; Pr. Ch. 200, Eales v. England. [(*a*)But this opinion of Lord Hobart is directly contradicted by my Lord Hardwicke, who says, that "a trust is where there is such a confidence between the parties, that no action *at law* will lie; but it is merely a case for the consideration of this court," meaning a court of equity. 2 Atk. 612.] ‖(*b*)This point appears not to have been directly determined. See the arguments in Burgess v. Wheate, 1 Eden, 177.‖

When all the remainders are *vested remainders* in tail, the *trustees may join in making a tenant to the præcipe*, in order to the suffering a common recovery. *But if any remainder is in contingency*, the trustees appointed to preserve contingent remainders ought not to join in suffering a recovery to bar any such remainder; *as*, where the remainder was *to the use of the body of A*, (*still living*,) and *A had issue C a son, and D a daughter*, and the trustees join with C in a bargain and sale enrolled, for making a tenant to the *præcipe* to suffer a common recovery, which is suffered accordingly, and C dies, leaving an infant son: now if the son should die without issue, in the life of A, in such case D would be heir of A's body. This would be a breach of trust; and in case of a purchaser having notice, his title would not be good.

2 P. Wms. 201. It was so said by Talbot, Solicitor-General, in the case of Marlow v. Smith.

Where *a settlement on the marriage of A with M was made by J S to the use of A for ninety-nine years*, remainder *to E and F, trustees*, for *ninety-nine years*, remainder *to trustees during the life of A, to support contingent remainders*, remainder *to M for life*, remainder *to the first, &c., son of the marriage*, remainder *to the heirs of the body of A*, remainder *to the right heirs of A;* there being *no issue* of the marriage, and the remainder in fee being contingent, in regard the limitation to A was for years only; and the estate not moving from A (for if so, the remainder limited to A had been the old reversion,) the trustees joined to destroy this contingent remainder. On a bill brought by a remote relation, the court refused to punish the trustees, as *distinguishing* between a *voluntary settlement* and one made on a *valuable consideration*. And the Master of the Rolls said, that *if a son had been afterwards born it would have been a breach of trust;* but this remainder to the right heirs of A being a *remote limitation, and not within the consideration of the settlement*, equity would not punish it as a breach of trust.

1 P. Wms. 358, 359, Sir Thomas Tippen's case; [1 Eq. Ca. Abr. 385, S. C.; Gilb. Eq. R. 34, S. C.]

So, where a *remainder in tail being vested in the first son, the trustees joined* with him *in suffering a common recovery;* it was held no breach of trust, though *against the consent of the father;* for when such remainder was vested in one of full age, a subsequent remainder was not to be regarded; neither was it assets in law or equity. Cited *per* Mr. Vernon, and so held since the case of Sir Thomas Tippin, *suprà*.

1 P. Wms. 537, Winnington v. Foley. [Note, this decision was upon an application to the court to direct the trustee to join.]

But where J S, seised in fee of lands, devised the same to A and B and their heirs, to the use of D his sister, for life, remainder to A and B and their heirs, during the life of D, in trust to preserve contingent remainders,

remainder to the use of the first, &c., sons of D, in tail-male successively, remainder to the use of E M in fee: testator dying without issue, D entered and married C; afterwards C and D his wife, and E M, the remainder-man in fee, join in a feoffment to (new) trustees to the use of C and his heirs, and covenant to levy a fine to the (new) trustees to the same uses; and a fine (as it seems, though not stated in the case) was accordingly levied; afterwards A and B (the trustees for preserving, &c., in the will,) by lease and release, convey the lands to C in fee, D being then *enseint* of a son, who was soon afterwards born, and named G, and D had afterwards several other children; subsequent to which, C, the father, devised all his lands in general words to the said G for life, remainder to his first, &c., sons in tail-male successively, remainder to his (C,) the testator's, second son by D for life, remainder to his first, &c., sons in tail-male successively, and died, leaving several sons, and D also died; on a bill by G it was resolved by King, C., assisted by Lord Chief Justice Raymond and Chief Baron Reynolds, that the joining of the trustees to destroy the contingent remainders was a plain breach of trust; and that though this had not been before judicially determined, yet it seemed to the court, in common sense, reason and justice, to be capable of no other construction: and all parties were decreed to join in making such an estate to G as he would have been entitled to under the will of J S, if these contingent remainders had not been destroyed, *i. e.* an estate in tail-male, &c.

2 P. Wms. 678, Mansell v. Mansell; Cases in Eq. temp. Talbot, 232, S. C. ‖ See Moody v. Walter, 16 Ves. 283; Osbury v. Bury, 1 Ball. & B. 58.‖ In this case it was said, that where an estate is limited *to A for life*, remainder *to his first, &c., sons in tail*, though it be a plain wrong and tort in him to do any act which will destroy those contingent remainders before the birth of a son, notwithstanding his *legal* power of doing so; yet as in this case there is no trustee, there can be no trust, nor consequently any breach of trust, and therefore *this* court can have no conusance of such a case, nor handle for relief, the matter being left purely to the *common* law. But to prevent this inconvenience has the remedy of appointing trustees been invented, on purpose to *disable the tenant for life* from doing such injury to his issue, which is not a very old invention. *Per* Lord Ch. J. King, assisted *ut suprà*. 2 P. Wms. 612, 613. ‖As to the cases in which trustees will be ordered to make conveyances, in order to defeat the contingent estates, see Moody v. Walters, 16 Ves. 283; Biscoe v. Perkins, 1 Ves. & B. 485.‖

If A, seised in fee, in trust for B, for full consideration conveys to C, who has notice of the trust, and afterwards C, to strengthen his own estate, levies a fine; B, the *cestui que trust*, is not bound to enter within five years; for C having purchased with notice, notwithstanding any consideration paid by him, is but a trustee for B, and so the estate not being displaced, the fine cannot bar.

1 Vern. 149, Bovey v. Smith; [2 Atk. 630, Story v. Ld. Windsor; 3 Atk. 563, Shields v. Atkins, S. P.]

So, if an executor, in trust for an infant residuary legatee, renews a lease, part of the testator's personal estate, in his own name, and first mortgages it, and then assigns the equity of redemption to a trustee, to sell for payment of his own debts, and his trustee sells to one who has notice of the infant's title, the purchase will be set aside.

1 Vern. 484, Walley v. Walley.

[If a trustee conveys to one who has *no* notice of the trust, and the grantee levies a fine, and five years pass, and afterwards the trustee purchases the same lands again for a *bonâ fide* consideration; still he shall be a trustee, as he was before.

Bovey v. Smith, 1 Vern. 70.]

‖ But a stranger who purchases with notice from a person who purchased for valuable consideration without notice, may, it is conceived, shelter himself under the first purchase.

See Lowther v. Carlton, 2 Atk. 242; and the case in note to Mr. Sanders's edition. 11 Ves. 478, Macqueen v. Farquhar.‖

[But if a trustee, when in possession, alienates for a valuable consideration, and without notice, the sale will be good, and the purchaser will not be a trustee in his stead. The *cestui que trust* may indeed compel the trustee to make satisfaction in such case; but the breach of trust is considered but as a simple contract debt, and can only fall upon the personal estate of the trustee, unless the trustee has acknowledged the debt to the trust-estate under hand and seal.

Millard's case, 2 Freem. 43; Hardr. 469; 1 Ch. R. 245; Vernon v. Vaudrey, Barnardist. Ch. R. 280; 2 Atk. 119, S. C.; Gifford v. Manley, Ca. temp. Talbot, 109.]

A bare trustee cannot alter the nature of the trust by turning land into money, or money into land, so as to make it vest in different persons, by his act than it would otherwise have done.

Farlam v. Sanders in Chanc. Mich. 28 G. 2, MS. Rep.; and see 3 P. Wms. 100, Witter v. Witter.

β Where trustees are empowered by deed to sell real estate, and with the proceeds to pay debts and make investments in stocks, they are not authorized to exchange the trust property for other real estate.

Ringgold v. Ringgold, 1 Har. & Gill. 11.β

[So, where an executor in trust for an infant on a lease for ninety-nine years, determinable on three lives, upon the lord's refusing to renew but for lives absolutely, complied with the lord and changed the years into lives; this, upon the infant's dying under twenty-one and intestate, was adjudged to be a trust for his administrator, and not for his heir.

Witter v. Witter, 3 P. Wms. 99. ‖See Milner v. Harewood, 18 Ves. 274.‖

But, where a feme purchased a church lease to her and her heirs for three lives, and died, leaving an infant daughter, two of the lives died, and the guardian renewed the lease, it was holden, that this renewed lease was a new acquisition, and should go to the heirs on the part of the father.

Mason v. Day, Pr. Ch. 329; Pierson v. Shore, 1 Atk. 480, S. P.

However, in general, it is true, that a guardian or trustee shall not alter the nature of an infant's property, so as to change the right of succession to it in case of the infant's death, unless by some act manifestly for the advantage of the infant at the time.

Rook v. Warth, 1 Ves. 461; Tullit v. Tullit, Ambl. 370; Inwood v. Twyne, Ibid. 417; Vernon v. Vernon, cited in Ex parte Bromfield, 3 Bro. Ch. R. 513.]

{A devisee of all the testator's effects, real and personal, in trust for the testator's widow and children, received from the widow, who was executrix, on her going abroad to recover part of the property bonds for a debt due from him and his partners to the estate; and in settling the affairs of the partnership on the retirement of one partner, who had notice of the trust, delivered to him the bonds to be cancelled without the privity of the *cestuis que trust*, continuing to make remittances on that account from the funds of the new partnership. Upon their bankruptcy, the partner who retired was held to be answerable to the *cestuis que trust*.

4 Ves. J. 36, Dickenson v. Lockyer.}

(F) What defeats the Trust, or destroys contingent Remainders.

β Devise to trustees, one of whom was the mother of *cestuis que trust*, with power to make advancements; she alone acted and made advancements without the concurrence of her co-trustee; held, that the proper discretion not having been exercised, such could not be allowed, and that an after-taken husband was liable for her breach of trust.

Palmer v. Wakefield, 3 Beav. 227.

Where, by the terms of the settlement, it appears to be the intention of the parties that there should at all times be two trustees of the property comprised in the settlement, the appointment of a single trustee in the place of two original trustees, and the transfer by them of the trust property to such single trustee, is a breach of trust, and the original trustees are answerable accordingly.

Hulme v. Hulme, 2 Mylne & K. 682.

When several trustees are implicated in a breach of trust, the bill to recover the trust-fund cannot be against some of them only, but all those who are living, and the representatives of those who are dead, must be made parties.

Munch v. Cockerell, 8 Sim. 219.

Where personal estate of one of two trustees has been distributed among legatees, in ignorance of a claim against the estate in respect of breach of trust; held, that the *cestuis que trust* were still entitled to follow the estate in the hands of the surviving legatees and the personal representatives of the trustee and the legatees of his deceased legatees, and that without any inquiry whether the plaintiffs knew of, or acquiesced in the breach of trust, or of an arrangement made between the trustees and the parties interested in respect thereof.

March v. Russell, 3 Mylne & C. 31.

Where trustees of the separate property of a *feme covert*, without power of anticipation, joined in a lease for which a fine was paid, and received by a third person; held, a breach of trust, though the *feme covert* joined in the lease.

Booth v. Purser, 1 Irish Eq. R. 37.ℊ

(F) What Acts of the Trustee, jointly with *Cestui que trust*, or by *Cestui que trust* only, shall defeat the Trust, or destroy contingent Remainders.

Though at law, by the trustees concurring in any act to prevent the rising of the contingent remainders, it was formerly held that it was for ever destroyed and gone; yet Cowper, C., held this to be an exploded opinion now in Chancery, as to persons who are to come in and be considered as purchasers under the marriage settlement and portion. But as for voluntary remainders, (as a remainder to the right heirs of the body of the husband, and after to his right heirs, neither of which can be said to be within the purchase of the marriage portion, but only the first and other sons, &c., of the marriage,) this court will not assist them to support the remainder so destroyed.

Gilb. Eq. R. 34, Tipping v. Piggot. βA conveyance in tail, to trustees to preserve contingent remainders, may be cancelled by a decree, so as to bind the interests of all, though the *cestui que trust* be not made defendant. Campbell v. Watson, 8 Ohio, 498.ℊ

If trustees in a settlement, to support contingent remainders, join with the tenant for life in any conveyance, to destroy the contingent remainders

before they come *in esse*, this is a plain breach of trust; and whoever claims under such a conveyance, having notice of the trust, or by a voluntary settlement, shall be liable to make good the estate.

2 Salk. 680, Pye v. George; 1 P. Wms. 128, S. C.; [1 Bro. P. C. 359, S. C.] ‖For cases in which trustees will be ordered to make conveyances in order to defeat contingent estates, see Moody v. Walters, 16 Ves. 283; Biscoe v. Perkins, 1 Ves. & B. 485.‖ But if a trustee join with a *cestui que trust* in tail in any conveyance to bar the entail, this is no breach of trust; for it is no more than what he may be compelled to, though the *cestui que trust* himself might have barred such entail without his joining; and that not only by fine or recovery, but likewise by feoffment, bargain or sale, devise or surrender (if the entail be of a copyhold, and there be no particular custom which requires a common recovery;) for such entail is not within the statute *de donis*, but remains as at common law; and being a trust is governable only by the rules of equity, and not by the niceties of the law: and this seems to be supported not only by the latter, but by the far greater number of authorities and in cases wherein the very point itself was debated, though there are *obiter* sayings and opinions, which have made some distinctions, and others which have flatly contradicted it. Vide 1 Chan. Ca. 49, 213; 2 Chan. Ca. 64, 78; 1 Vern. 13, 440; 2 Vern. 133, 583, 702.

But, if a settlement on a marriage-treaty be made on the husband for ninety-nine years, if he live so long, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of the husband by the wife, remainder to the heirs of the husband; and there be issue two sons and a dauhgter; and the wife being dead, the husband and trustees join with the eldest son in a fine or feoffment to J S; this is a good bar of the trust estate, and the trustees joining is no breach of trust, for they were trustees purely for the tenant in tail, and to preserve his estate, and not to stand in opposition to him for the sake of those who were to come after him.

2 Vern. 754, Elie v. Osborne; and see 1 P. Wms. 387, S. C. by the name of Else v. Osborne.

Trustees to preserve contingent remainders, if tenant for life or years commit waste, may restrain them by injunction. If there is only an estate for years, remainder to first and other sons, remainder in tail, and no trustees to preserve, &c., the remainder-man in tail before issue born, would have an immediate freehold; and if it had been tenant for life and no trustees, he might before issue born have surrendered to the remainder-man, or barred the whole estate. The rise of these trustees was from Chudley and Arther's case in Co. Rep., and remainders in trustees and their heirs during the life of another person have been held good, as that person may commit a forfeiture. Where there is tenant for years, with remainder to trustees during his life to preserve contingent remainders, the freehold is in the trustees, and the possession of tenant for years is in law the possession of the owner of the freehold. It is agreeable to justice in support of right to construe trusts in the most liberal manner. Trustees are the creatures of this court, and under the correction of it intended to preserve the inheritance entire. These trusts are generally declared with power to make entry and bring *actions*, &c., as the law requires, which includes equity too: and trustees may bring a bill in equity to stay waste, before the contingent remainder comes *in esse*. Trustees are liable in equity to make satisfaction for breach of trust, and a voluntary alienee, with notice, will be decreed to restore the estate.

Garth v. Cotton, MS. Rep. ‖3 Atk. 751; 1 Dick. 183. See 1 Ves. 524, S. C. Stansfield v. Habergham, 10 Ves. 278.‖

(G) In what Cases Equity will decree Trustees to join in a Recovery, &c., with *Cestui que trust.*

In some cases, trustees have been decreed to join for the benefit of creditors:—Thus, where J S, after marriage, made a voluntary settlement of his lands *to himself for life*, remainder *to trustees to support, &c.*, remainder *to his first, &c., son in tail successively*, remainder to *himself in fee;* and contracting debts, he afterwards makes a conveyance of his estate to other trustees for payment of these debts; the creditors bring a bill, and (*inter alia*) insist that the trustees in the first settlement should join in the sale to destroy the contingent remainders; his honour, upon showing a precedent of a like decree, decreed that the trustees should join to destroy the contingent remainders, and be indemnified, it being at the suit of creditors, and for the raising of money for the payment of debts.

1 P. Wms. 358, Basset v. Clapham. Note. By the 7 Ann. c. 19, infants being trustees or mortgagees, may be compelled to make conveyances by order of the Court of Chancery. {See 5 Ves. J. 240, Ex parte Anderson; 10 Ves. J. 554, Ex parte Cant.} It is a general rule in equity, that where a real or personal estate is charged with payment of debts generally, and vested in trustees to sell, the purchaser from such trustees is not answerable for any misapplication of the money, and needs not see that the debts are paid. But if it is made chargeable with particular debts, it is otherwise; or if there is any collusion between the executor or trustee and purchaser, the purchase would be infected with the fraud or collusion. *Per* Lord Chancellor Hardwicke, Mich. 27 G. 2, Anon. MS. Rep.; and see 1 Vern. 260, Dutch v. Kent; and Ibid. 303, Spalding v. Shalmer, S. P. {See also 4 Ves. J. 100, Crewe v. Dicken; 6 Ves. J. 654, n.; 8 Ves. J. 417, Lord Braybroke v. Inskip; 12 Ves. J. 89, Curtis v. Price.}

‖By the 39 & 40 G. 3, c. 88, § 12, and 47 G. 3, sess. 2, c. 24, the king is authorized to direct the execution of any trusts affecting lands which have become vested in him in consequence of escheat, forfeiture, or otherwise.(*a*)

(*a*) See Ex parte Tutin, 3 Ves. & B. 149.

By the 36 G. 3, c. 90, in cases where the trustees in whose name stock is standing shall be absent and out of the jurisdiction of the Court of Chancery or Exchequer, or be bankrupt, or lunatic, the court may, in any cause depending, order the stock to be transferred either to or into the name of the Accountant-General of the Court of Chancery, or Deputy Remembrancer of the Exchequer, in trust in the cause, or to and into the name of the person equitably or beneficially entitled to such stock, as the case may require, and as to the said courts shall seem fit, and also to order and direct the mode in which the dividends shall be paid.

By 1 Will. 4, c. 60, "for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling courts of equity to give effect to their decrees and orders in certain cases," sect. 3, it is enacted, that where any person seised or possessed of any land upon any trusts or by way of mortgage shall be lunatic, it shall be lawful for the committee of the estate of such person, by the direction of the Lord Chancellor of Great Britain, to convey such land in the place of such trustee or mortgagee to such person and in such manner as the Lord Chancellor shall think proper, and such conveyance shall be as effectual as if the trustee or mortgagee had been of sane mind, &c.

By § 4, where stock shall be standing in the name of a lunatic, as a trustee or executor either alone or jointly with any person, or shall continue to be standing in the name of a deceased person whose executor shall be lunatic, or shall be otherwise vested in any lunatic for the benefit of some other person, the Lord Chancellor may direct the committee of the

estate of such lunatic to transfer such stock into the name of such person and in such manner as the Lord Chancellor shall think proper, and also to order such person to receive and pay over the dividends of such stock in such manner as the Lord Chancellor shall direct.

By § 5, where any such person being lunatic shall not have been found such by inquisition, it shall be lawful for the Lord Chancellor to direct any person, whom he may think proper to appoint in place of such lunatic, to convey such land, or transfer such stock and receive and pay over the dividends thereof; and every such conveyance, transfer, receipt, or payment, shall be as effectual as if the said person being lunatic had been sane and had made or executed the same: but where any such sum of money shall be payable to such lunatic, no such last-mentioned order shall be made, if such sum shall exceed 700*l.*

By § 6, where any person seised or possessed of any land upon any trust, or by way of mortgage, shall be under the age of twenty-one years, it shall be lawful for such infant, by direction of the Court of Chancery, to convey the same to such person and in such manner as the court shall think proper; and every such conveyance shall be as effectual as if the infant trustee or mortgagee had been of the age of twenty-one years.

§ 7 relates to infant trustees of land in the duchy of Lancaster, and the counties palatine of Lancaster, Chester, and Durham.

By § 8, where any person seised of land upon trust shall be out of the jurisdiction of the Court of Chancery, or it shall be uncertain, where there were several trustees, which of them was the survivor, or it shall be uncertain whether the trustee last known to have been seised be living or dead, or if known to be dead, it shall not be known who is his heir; or if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution, by, or by an agent duly authorized by, any person entitled to require the same, then the Court of Chancery may direct any person whom it shall appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the court shall think fit; and every such conveyance shall be as effectual as if the trustee seised as aforesaid, or his heir, had made or executed the same.

By § 9, a similar provision is made in the case of trustees of leasehold estate being out of the jurisdiction, &c., &c., (as in the former section.)

By § 10, where any person in whose name as a trustee or executor, either alone, or together with the name of any other person, or in the name of whose testator (whether as a trustee or beneficially) any stock shall be standing, or any other person who shall otherwise have power to transfer or join with any other person in transferring any stock to which some other person shall be beneficially entitled, shall be out of the jurisdiction of, or not amenable to, the process of the Court of Chancery, or it shall be uncertain whether such person be living or dead; or if any such trustee or executor or other person shall neglect or refuse(*a*) to transfer such stock, or receive and pay over the dividends thereof to the person entitled thereto, or to any part thereof respectively, or as he shall direct for the space of thirty-one days next after a request in writing for that purpose shall have been made to any such trustee or executor or other person by the person entitled as aforesaid, then the Court of Chancery may direct such person as the court shall appoint, in the place of such trustee or executor or other

person, to transfer such stock to or into the name of such person, and in such manner as such court shall direct, and also to order any person appointed as aforesaid to receive and pay over, or join in receiving and paying over, the dividends of such stock in such manner as the said court shall direct.

(*a*) See 1 Turner & Russ. 330.

By § 13, any committee, infant, or other person directed by virtue of this act to make or join in making any conveyance or transfer, or receipt or payment, shall and may be compelled, by the order to be obtained as hereinbefore mentioned, to execute the same in like manner as trustees of full age and sane mind are compelled to convey, &c., the trust estates vested in them.

By § 15, every person being in other respects within the meaning of this act, shall be deemed a trustee within the meaning of this act, notwithstanding he may have some beneficial interest or estate (*a*) in the same subject, or may have some duty as trustee to perform.

(*a*) Under the act 4 G. 2, c. 10, the lunatic trustee was not within the act, if he had a beneficial interest. Ex parte Tutin, 3 Ves. & B. 149.

But in every such case it shall be in the discretion of the Court of Chancery, if requisite, to direct a bill to be filed to establish the right of the party seeking the conveyance or transfer, and not to make the order for such conveyance or transfer, unless by the decree to be made in such cause, or until after such decree shall have been made.

By § 18, the provisions of the act shall extend to every case of a constructive trust, or trust arising or resulting by implication of law,(*b*) but in every such case where the alleged trustee has or claims a beneficial interest adversely to the party seeking a conveyance or transfer, no order shall be made for the execution of a conveyance or transfer by such trustee until after it has been declared by the Court of Chancery, in a suit regularly instituted in such court, that such person is a trustee for the person so seeking a conveyance or transfer; but the act shall not extend to cases upon petition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case before expressly provided for.

(*b*) The act 7 Ann. c. 19, applied only to trusts expressly declared, and not to trusts implied by law. Goodwin v. Lister, 3 P. Wms. 387; and see 4 Russell, 513.

By § 19, where any feme covert would be a trustee, mortgagee, heir, or executor, within the provisions of the act, if she were an infant or lunatic, and out of the jurisdiction, &c. &c., as before mentioned, and the concurrence of her husband shall be necessary in any conveyance, transfer, receipt or payment which ought to be be made or executed by her as such trustee, mortgagee, heir, or executor, then and in any such case such husband, whether under any disability or not, shall be deemed a trustee within the meaning of the act.

By § 21, the act is extended to petitions in cases of charities, or benefit or friendly societies.‖

So likewise a court of equity will decree trustees to join for the apparent benefit of the family.

In a marriage settlement the husband was made tenant for ninety-nine years, if he should so long live, remainder to trustees during his life, remainder to the first, &c., son of that marriage in tail-male successively, remainder to the first, &c., son of any other marriage, remainder over. A son is born and of age, and the wife is dead. The trust for preserving contingent remainders descends to an infant. If for the benefit of the

family, equity will decree the infant trustee to join in a recovery, in order to make a new marriage settlement.

1 P. Wms. 536, Winnington v. Foley.

Likewise, where A having mortgaged his lands, and also confessed a judgment, and afterwards on a marriage treaty, settled the lands thus encumbered to the use of himself for life, remainder to the trustees to support contingent remainders, remainder to his wife for life, remainder to his first and other sons in tail, remainder to his own right heirs, and having no issue, articled to sell the lands to J S, who brought a bill for a specific performance of the agreement, and suggested that the trustees refused to join, and that the mortgagee threatened to enter; it was decreed, that the trustees should join and be indemnified, the estate being of an equity of redemption only, and there being no issue, (though the husband and wife were married six years,) and the wife, on her examination in court, consenting freely thereunto. But *note;* those settlements can rarely be broken through but by an act of parliament.

2 Vern. 303, Platt v. Sprigg.

Where, on marriage, lands were limited to the use of A for ninety-nine years, if he should live so long, remainder to B, and other trustees, (of which B was the survivor,) and their heirs during A's life, to preserve, &c., remainder to A's wife for life; remainder to the first, &c., sons of the marriage in tail-male successively, remainder over; the wife died, leaving issue of the marriage only two sons, C and D. A having mortgaged the premises, he and his son C, (C being then of age,) covenanted to suffer a recovery, and to procure B the surviving trustee to join therein, but B refusing to join in making a tenant to the *præcipe*, the mortgagee prayed a specific performance of the covenant, and that B might join in suffering the recovery; B by answer submitted to the court, but D the younger son refused to consent: Lord Chan. King said, that then he would not decree the trustee to join, for that he would not take away any man's right; so dismissed the bill as to B and D with costs, but decreed A and C specifically to perform the covenant.

2 P. Wms. 379, Townsend v. Lawton.

Likewise, where J S by a marriage settlement was *tenant for ninety-nine years, if he* should so long live, with remainder *to trustees and their heirs during his life*, to support contingent remainders, with remainder *to his first and every other son successively in tail-male*, remainder *to trustees for* 500 *years*, in trust *to raise portions for daughters*, if there were *no issue male*, or that such issue male died without issue before twenty-one; J S had issue a son, and being of age and to marry, he and his father bring in a bill to have the trustees join in making an estate, in order to suffer a common recovery, that he might be enabled to make a settlement on his marriage; and it was urged, that the trustees were only trustees for the son, and ought to execute estates as he should direct, he having the inheritance in him, and that the end of the trusts was to hinder the father from defeating the son of the estate. On the other side, it was urged, that these trustees were not only trustees for the eldest son, but were designed as a guard to the whole settlement; that the mother being living, there might be other children, and for the trustees to join would be a breach of trust, and if there should be daughters they would by this means be entirely stripped of their portions; and though the term for raising them was un-

skilfully drawn, in putting it behind the estate-tail to the sons, yet this court had set it sometimes before those estates. There being a daughter in this case, my Lord Harcourt directed, upon *giving security for the daughter's portion*, that the trustees should join in a recovery.

1 Abr. Eq. Ca. 386, Frewin v. Charleton.

[On a bill to compel trustees to join in a sale, which would destroy the contingent remainders, and likewise the uses in a settlement made before marriage, it appeared, that the limitations were to the husband for ninety-nine years, if he so long lived, to the wife for her life, remainder to trustees to support contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband; and that the first declaration under it was, that it was the intention of the settlement to make a provision for the children of the marriage, with a covenant on the part of the husband, that he would not bar the estate tail to the wife, but would preserve the uses before limited and appointed. Lord Hardwicke dismissed the bill, and said,—There are many cases in which the court will compel the trustees to join in such conveyance as will destroy contingent remainders; but then it must be in some measure to answer the uses intended by the settlement, and has been usually done in the case of old settlements, as in Winnington v. Foley (*suprà*); but, I believe, there is no instance where they have compelled such trustees to join with the father, termor for years, and the son to sell the estate. The old notion was, that these trustees were only honorary; but this has been varied since, for in the case of Pigot v. Pigot, Lord Harcourt was of a different opinion, and in Mansell v. Mansell, (*suprà*,) Lord Chancellor King, assisted by Lord Chief Justice Raymond, and Lord Chief Baron Reynolds, was of opinion, that *trustees for preserving contingent remainders joining to destroy them, were guilty of a breach of trust, and that there was no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only*. But the reason of those cases turned upon what the court do after trustees had actually destroyed the remainders: here the case is different, for the application to the court is to compel the trustees to do an act which would destroy the remainders. There is another difficulty, which is, the husband's actually covenanting in the settlement, that he will not bar the estate-tail to the wife, but preserve the uses before limited; and even though the husband were dead, the wife could not do any act by which she could bar the estate-tail, notwithstanding the trustees should consent to join with her; for she is absolutely restrained from barring it by 11 H. 7, c. 20. If it had been an application only to destroy the contingent remainders, I should have taken more time to consider: but here, it would overturn all the uses of a marriage settlement, which would be assuming too much power, and would be making a decree to compel a breach of the husband's own covenant.

Symance v. Tattam, 1 Atk. 613.

J H devised his lands, after the death of his wife and a trust term of one thousand years, to his son B H for ninety-nine years, if he should so long live, without impeachment of waste, remainder to two trustees and their heirs during the life of his son B, to preserve contingent remainders, remainder to the first and other sons of B in tail-male, remainder to H H his second son for ninety-nine years, if he should so long live, remainder to the same trustees and their heirs during the life of H H to preserve con-

tingent remainders, remainder to his first and every other son, remainder to his other sons in like manner, remainder to J H's daughters, remainder to the testator's heirs. There was a power for the sons, when in possession, to make jointures and leases, except as to particular lands, and another power for B and the other sons within two years after being in possession, and having a son of the age of eighteen, to revoke the former uses, and to limit new uses, so that the premises be limited to the heirs male of the sons in the same manner as these limitations, and to settle such like power of revocation. The testator died; B H his eldest son died without issue. H H the second son married and had a son C H, now above twenty-one. H H and his son became indebted by bonds to creditors, and made assignments of the settled estates in trust for creditors, and agreed to suffer a common recovery, to make the assignment and provision for the creditors effectual. A bill was brought by the creditors against H H and his son C, and against T H, (the fifth son of J H,) (all the sons who had intermediate remainders as before, being dead without issue,) and against A B the heir of the surviving trustee, to preserve contingent remainders, in order to compel her to join in a common recovery, and that the plaintiffs might have an effectual security and satisfaction for their debts. Lord Hardwicke,—It is agreed, there is no precedent where the court have decreed in such cases the trustee to join; and I am of opinion, this is not such a case, where the court ought to decree it. Trustees of this kind are called *honorary* trustees, and intrusted by parties to preserve the contingent remainders: but, I will not say, if the trustee who is appointed should join, it would be such a breach of trust that this court would decree a satisfaction. The reason of making the father tenant for ninety-nine years is, in order to preserve the estate. It may likewise be the design of such settlements to prevent the father's influence over the son when of age, if the father were seised of the freehold, to get the son to destroy the settlement. Here the intention is to pay the debts of the father. The objection is, that the trustee is trustee for the first tenant in tail, and, that when the tenant in tail is seised of the freehold, then he has a power to bar, and not before. As to the cases, there are but few: Mr. Winnington's was in order to let in the jointure, and a provision for younger children, which was still carrying it on in the family. The argument made use of by the plaintiff's counsel, was, that here it is prayed to execute the trust of articles; and to be sure, it is true; but this court is not to decree every trust created by the parties; and though, as has been said before, the court might not condemn the trustee if he consented, yet it does not follow that the court will compel the trustee, and I think *this* the very case which was intended to be prevented by the trust; wherefore the bill must be dismissed.

Woodhouse v. Hoskins, 3 Atk. 22.

F B devised freehold and copyhold estates to T C B for ninety-nine years, if he should so long live, remainder to the defendant L, during the life of T C B, in trust to preserve contingent remainders, remainder to the first and other sons of T C B in tail-male, remainder to J W in fee. T C B had issue only one son, who had attained twenty-one years of age, and the father and son now filed a bill against L, the trustee, and J W the remainder-man, stating, that they were desirous of suffering a recovery and limiting the estate so as to preserve the contingent remainders to the second and other sons of T C B, and praying, that L the trustee might be decreed to join in making a tenant to the *præcipe* for that purpose, submitting to

(H) What Estate Trustee shall convey, and to whom.

declare the uses of the recovery to the second and other sons of T C B, by way of contingent remainders as limited by the will, and to limit an estate to a trustee for the purpose of supporting and preserving those contingent remainders. The Master of the Rolls, Sir Thomas Sewell, observed, that, with respect to remainders to remote relations in *settlements*, where the persons to whom they were limited were not the immediate objects of the parties, or, where they stand in opposition to the first tenant in tail, desiring a reasonable benefit, consistent with the intentions of the creator of the limitations, their pretensions have not been much considered; but in the principal case, all took as volunteers, and were all equally to be attended to. His honour then considered the several cases on this subject, and said, that, from a view of them all, it seemed, that when the eldest son, tenant in tail, is of age, and about to marry, and thereby *continue*, instead of *destroying* the purposes of the settlement, and in some cases where there has been particular distress under particular circumstances, which ought to have induced the trustee to join, the court has interfered; otherwise not: that in the principal case he was called upon to disturb the testator's disposition merely for the sake of disturbing it, for which he saw no reason, and dismissed the bill with costs.

Barnard v. Large, 2 Cox's P. Wms. 684, note; 1 Bro. Ch. R. 534, S. C.; Ambl. 774, S. C.]

Cestui que trust in tail under a devise of lands charged with annuities, brings a bill against the trustees, to the intent they should join in a recovery. This is not proper, but it is proper to pray, that the trustees may convey the premises to *cestui que trust* in tail, who may then suffer a recovery; though if the trustees are also trustees for an annuity subsisting, they are not compellable to part with the legal estate out of them to the *cestui que trust* in tail.

2 P. Wms. R. 134, Carteret v. Carteret. ‖See Young v. Leigh, Cary, 95.‖

Note: A devise to trustees, and their heirs in trust to sell, is deemed equitable assets, in order to make an equal distribution among all the creditors.

Howard v. Hall, Hil. 1744, MS. Rep. [The rule now seems to be, that wherever the character of trustee can be fastened on the devisee, the assets shall be equitable. Lewin v. Oakley, 2 Atk. 50; Silk v. Prime, 1 Bro. Ch. R. 138; Batson v. Lindegreen, 2 Bro. Ch. R. 94.]

(H) When a Trust is to be executed, what Estate or Interest is to be conveyed, and to whom.

It is now constantly held in Chancery, that if lands are vested in trustees to the use of one and the heirs of his body, with remainder over, that the trustees are not to convey a fee, but an estate-tail, though he will have power to bar the entail, when the conveyance is made to him, and it would avoid circuity. So, if a sum of money be appointed to be laid out in a purchase, and the lands to be settled in tail; the purchase and settlement shall be made accordingly, *and not the money paid to the party;* for the remainder-man has a chance for the estate, in case the tenant in tail in possession die without issue before any recovery suffered, which he may omit through ignorance or forgetfulness, or he may be prevented by death before he has completed it.

1 Abr. Ex. Ca. 395.

‖But now by the 40 G. 3, c. 56, it is enacted, that in all cases where

money under the control of any court of equity, or to which any individuals, as trustees are possessed or entitled, shall be subject to be invested in lands, &c., to be settled upon any persons in such manner that it would be competent in case such money had been invested in the purchase of real estates for the person who would be tenant of the first estate-tail therein, either alone or together with the owner of the particular preceding estate, by deed, fine, or recovery, or any of them, or other lawful act to bar the estate-tail and the interests of the remainder-man, it shall not be necessary to have such money actually invested in lands, in order that such estates and remainders may be so barred, but that it shall be lawful for the High Court of Chancery, or such court under control of which such money shall be, and in case of trustees, for the High Court of Chancery in a summary way upon petition of the person who would be tenant of the first estate-tail, and of the person who would be owner of the precedent particular estate, to order the moneys subject to such trusts to be paid to such petitioner, to be paid and applied in such manner as the petitioner shall appoint and the court shall approve.||

Where an estate was limited to A and B in trust for C, and the heirs of his body, *proviso*, that if he die without issue, then in trust for D for life, with remainder over, and C brought his bill to have the trustees make a conveyance of the legal estate to him, and that it might be to him in fee, to prevent him from suffering a recovery, the trustees by answer submitted to the court; but the other remainder-men, who were defendants, opposed the executing any legal estate to C, because he would then suffer a recovery, and defeat the intent of the donor, which was, that it should be preserved for them, in case C had no issue. They alleged, that C had married improvidently and was extravagant, and would spend the estate, and cited the case at the end of Twine's case, 3 Co., where, if an improvident man makes a voluntary settlement to put it out of his power to spend his estate, this settlement shall be supported even at law; and therefore a court of equity will never help an extravagant man to destroy such a settlement as this; and that, in the case of Sir Fra. Garrard, the Lord Ch. Jefferies had refused to decree the trustees for Sir Francis and the heirs of his body, with a remainder to a charity, to convey the legal estate, so as to enable him to suffer a recovery. On the other side, it was said, there was no reason any trustee should hold my estate, whether I will or no; and that, if a court of equity did not decree a conveyance in such case, it would be establishing a perpetuity; and that the constant course of this court is, that when money is given to be laid out in a purchase to be settled in tail, with remainders over, the court will decree the money to him that was to be tenant in tail, if he desire it, to prevent circuity. But the Master of the Rolls decreed the trustees to execute a conveyance to C in tail, but would not decree the conveyance to be in fee, though pressed to it; and he said there may be many reasons why a court of equity would not decree a conveyance at all in such a case, sometimes for a politic reason, as if it were to enable a nobleman to suffer a recovery, and leave the *honour* bare, without estate; or if the party were a notorious spendthrift, or when the estate-tail was only by implication, as he said he took it in Sir Fra. Garrard's case: and he thought it would be an ungodly thing in the trustees to execute a conveyance of the legal estate in such case as this at the bar, without a decree of the court. Hil. 1701, Saunders and Nevil. *Note:* Though the court would not decree a conveyance in Sir Fra. Garrard's case, yet he suffered a re-

covery as *cestui que trust* in tail, which was held good, and the estate enjoyed under it discharged of the charity.

1 Abr. Eq. Ca. 392.

Where a question arises how a trust ought to be executed by a conveyance, there is *no better rule than* to observe and follow *what has been done at law in executing conditions* that are matters *executory*, and to be performed so far as the case will admit of. *Per* Cowper, C.

2 Vern. 736, pl. 644, Newcomen v. Barkham.

If *tenant for life and remainder-man in tail join* in a bill against trustee, the court will decree the *trustee to convey to them*, or to whom they appoint; and possibly he may pay costs for refusing to convey, and putting his *cestui que trust* to the charge of an unnecessary suit.

2 Vern. 346, Bowater v. Elly.

A devised lands to a company in trust to convey to B for life, remainder to his first, &c., sons for their lives successively, and so to their issue male for their lives only, remainder over. *Per cur.*—An attempt to make a perpetual succession of estates for life is vain, and an *impracticable perpetuity*. However, the trustees *must make as strict a settlement as may be*, so that the persons in being are to be made only tenants for life; but where the limitation was to be to the son not in being, there he must be made tenant in tail-male.

2 Vern. 737, pl. 646, Humberston v. Humberston.

A husband, as administrator to his wife, obtained a decree against the trustees to raise her portion; but he, being a younger brother, having made no settlement on her, and having a son by her, the money was decreed to be raised, and put out for his benefit for life, then to the son for life; and if he leaves issue, and the father survives, he to have it.

1 Eq. Abr. Cas. 392, Whytham v. Cawthorn.

[A, in consideration of an intended marriage, entered into articles, by which he covenanted with trustees to settle an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife for life, remainder to the use of the *heirs male* of his body upon the body of his intended wife to be begotten, and the heirs males of such heirs males issuing, remainder to the right heirs of the said A for ever; and covenanted, that in case the said limitations were not thereafter well raised, according to the intent of the said articles, that he and his heirs would stand seised of the premises, until a further assurance thereof should be made to such uses, intents, and purposes, as in the articles were before expressed and declared. The marriage took effect, and A had issue four sons and two daughters. The articles were laid *by unnoticed* for several years, and A levied a fine of the lands (supposing himself to be tenant in tail under the articles;) and afterwards, both the trustees being dead, without requesting a settlement, A's eldest son having married against his father's consent, and by several other acts of weakness and disobedience much offended him, A, by deed reciting the said articles, and the weakness and disobedience of his eldest son, declared, that the said fine so levied by him, should inure to the use of himself for life, without impeachment of waste, remainder to his wife for life, remainder to his second son in tail-male, with like remainders to his two younger sons, with remainder to his own right heirs; and after making a like settlement of other lands, A died intestate, leaving a great personal estate, and leaving a real estate

in Ireland, and new-purchased lands in England, together of the value of 1000*l. per annum*, and upwards. Upon his death, the estate in Ireland and the new-purchased lands descended to his eldest son, who also became entitled to his share (upwards of 9000*l.*) of the personal estate. The second son entered upon the settled estates; and the eldest son having got possession of the articles, which it appeared had been thrown by several years as useless, brought his bill for a specific performance thereof.

1 Eq. Abr. 387, Trevor v. Trevor.

It was insisted for the defendant, that though by the first part of the articles they seemed to be *executory*, yet by the covenant to stand seised in the last part of them, they were actually and immediately *executed;* that he thereby covenanted to stand seised to the before-mentioned uses, till a settlement was made accordingly; that no settlement having been made, the uses continued to be executed by virtue of that covenant; that by these uses he was plainly tenant in tail and by the fine had bound his issue and made himself master of the estate, and might dispose of it as he thought fit. But Lord Chancellor said, that upon articles the case was stronger than on a will: that articles were only minutes or heads of the agreement of the parties, and ought to be so modelled, when they come to be carried into execution, as to make them effectual. That the intention was to give A only an estate for life; that if it had been otherwise, the settlement would have been vain and ineffectual; and it would have been in A's power, as soon as the articles were made, to have destroyed them; that the covenant to stand seised was until such time as the said uses were well raised, according to the true intent and meaning of the articles. That if a settlement had been made defective in any particular, it would not have been final or conclusive; that a second settlement must have been made *till the uses were well and truly raised;* and that this covenant for ever subsisted till such settlement should be made; that he hoped never to see the time when the court would so far have power as to judge what behaviour of a son should amount to a forfeiture of his estate; and therefore thought, if a settlement had been made, no misbehaviour of the son could amount to a forfeiture of it. That this estate being specifically agreed to be settled, it was a trust for the eldest son, which passed with the lands into whose hands soever they came, and could not be defeated by any act of the father or the trustees. And therefore he decreed a conveyance to the plaintiff, and the heirs male of his body, and an account of the profits from his father's death, and the deeds and writings to be delivered up. This decree was afterwards affirmed in the House of Lords.

‖See Hilton v. Biscoe, 2 Ves. 304, 308;‖ 2 Brown, Cases Parl. 122.

So where the husband, before marriage, agreed by articles to settle lands to the use of himself and his intended wife for their lives, and the life of the survivor, and afterwards to the use of the heirs of his body on the wife, and after the marriage, by settlement reciting the articles, conveyed the lands to the use of himself and his wife for their lives, and the life of the survivor, remainder to the use of the heirs of his body by his wife; it was held not to be a *proper execution* of the articles, though the articles did not expressly mention the intent to provide for the issue. For, Lord Talbot observed, it could not be doubted but that, upon an application to the court for carrying the articles into execution, it would have decreed it to be done in the strictest manner, and would never have left

it in the husband's power to defeat and annul every thing he had been doing,(*a*) and the *nature of the provision* was strong enough for that purpose, without any express words.

Streatfield v. Streatfield, Cas. temp. Talb. 176.] ‖(*a*) *Sed* vide Chambers v. Chambers, 5 Vin. 513; Fitzgibb. 127; 1 Sand. on Uses, 311.‖

Upon a marriage, articles were entered into, whereby it was agreed, that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband and wife for their lives, and the life of the longest liver of them, and after to the heirs of the body of the wife by the husband to be begotten; yet the Master of the Rolls decreed the settlement to be to the first and other sons, &c., so as the husband and wife might not have power to bar the issue.

1 Eq. Abr. Ca. 392, Jones v. Laughton.

So where, on a treaty of marriage between the defendant and the plaintiff Joanna, the defendant entered into a bond to the plaintiff Joseph, father of the plaintiff Joanna, with condition to surrender certain copyhold lands to the use of himself for life, remainder to the plaintiff Joanna for life, remainder to the heirs of their two bodies to be begotten, with remainder to the heirs of the husband; the marriage took effect, and a bill was brought against the husband to compel a surrender pursuant to the intent of this bond: the husband, making default at the hearing, was decreed to surrender to the use of himself for life, remainder to the use of his wife for life, remainder to the use of their first and other sons in tail general successively, with a remainder to the daughters of their two bodies to be begotten in tail general; and in the mean time, till such surrender was made, the court declared that the copyhold land should be held and enjoyed according to these uses.

Nandick v. Wilkes, 1 Eq. Ca. Abr. 393; Gilb. Eq. R. 114, S. C., under the name of Nandike v. Wilkes, *in totidem verbis*. Note.—This decree was on a bond, where, though the penalty seems to have been the only sanction intended for securing the performance of the condition, yet a specific execution was decreed, and in such a manner too as effectually to secure the issue from being defeated by making them purchasers. But note, in Gilbert, there is no mention in the decree of the remainder to the wife for life.

[Where articles were entered into by the husband, in which he covenanted that as well all the real estate that he had then in Ireland, as all the lands and tenements which he should purchase during the life of his intended wife, should *descend and come to the heirs male* to be begotten *on the body of the intended wife by the husband*, and should be secured and settled on the said *heirs male* by the husband, as the counsel of the intended wife should advise. Upon an appeal to the House of Lords, from a decree of the Court of Chancery in Ireland, the decree was reversed; and it was ordered that a son of the marriage should be deemed a *tenant in tail*, under the articles, and to hold and enjoy the lands against all persons claiming under a subsequent settlement by his father; who had *levied fines and suffered recoveries* to bar the *supposed entail*.

Cusack v. Cusack, 1 Bro. Ca. Parl. 470.

And in a case where the *husband* entered into a bond to surrender copyholds to the use of himself for life, remainder to his wife for life, remainder to the heirs *of their bodies*, then to the husband in fee; upon a bill against the husband, after the marriage, for execution of this engagement, the decree was, for him to surrender to the use of himself for life, remain-

der to the use of his wife for life, remainder to the use of the first and other sons in tail general successively, with remainder to the daughters in tail general.

Nandick v. Wilkes, 1 Eq. Abr. 303, c. 5; Gilb. Eq. R. 114.

So, where the intended wife's estate was articled to be settled on the husband and wife, and on the *heirs of their two bodies*, Lord Cowper admitted, that if no settlement had been made, the court would have taken care to secure to the daughters the provision intended them by the articles.

Vide Burton v. Hastings, *infrà*, 232.

Where, by articles previous to marriage, it was agreed to purchase lands, and settle them to the use of the husband for life, then of the wife for life, remainder to the use of the *heirs of her body by him;* they purchased and joined in a recovery to the use of a mortgagee in fee. Upon a bill by the eldest son after the death of his mother, insisting that he was entitled, on the construction of these articles in equity, to have the estate settled to the first, &c., son in tail-male, Sir Joseph Jekyll said, that if this had been a *common limitation*, he should have thought what was insisted on was right, and that the mortgagee must have lost his estate. But that this was particular to *the heirs of the body of the wife by the husband*, and being *ex provisione viri*, would secure the children against the father alone; and that it might be the real intent that *both might bar*, comparing it to *a power of revocation both by the father and mother;* and the defendant was therefore well barred.

Whateley v. Kemp, cited 2 Ves. 358.

So, in a subsequent case, Lord Hardwicke said he might compare it to the case where, by a settlement of lands, the wife has an estate *ex provisione virie;* the court has refused to interpose to settle the estate *otherwise*, because the intent will prevail, since she cannot alien by stat. 11 H. 7

Green v. Ekin, 2 Atk. 473.

Again, by marriage articles customary lands of inheritance of the intended husband, holden by copy of court-roll, were agreed to be settled to the use of the intended husband for life, remainder to his intended wife for life, and after the deceases of both, to the use of the heirs of *her* body by him if *he* survived her, but if *she* survived him, to the heirs of *his* body on her body to be begotten, remainder to his own right heirs. The marriage was had, and the husband afterwards surrendered the lands to the uses mentioned in the articles, and was admitted accordingly. And at the same court he and his wife surrendered to certain uses. And on a question between a son of the marriage claiming under the entail in the articles, and others claiming under the said surrender by the husband and wife: one of the points made, and that on which the decision proceeded, was, Whether the surrender to the uses in the articles was a due execution of the uses of the articles; and whether, by the subsequent surrender, the husband gained an absolute power over the wife? We are to observe, that estates-tail were barable by surrender, according to the custom.

Highway et al. v. Banner et al., 1 Bro. Chan. Ca. 584. ‖See Fearne's C. R. 34, 95, (7th edit.,) Brudenell v. Elwes, 7 Ves. 390.‖

The Master of the Rolls said, that the rule had been settled and adhered to in many cases, that articles for a settlement on a husband, and the *heirs of his body*, should be carried into execution in strict settlement; and it

had been considered as vain to make a settlement which instantly might be defeated by a recovery; but the doctrine had never gone so far, where that party could not suffer a recovery *alone*. He observed, that it was anciently a common mode of settlement to the husband for life, to the wife for life, and to the heirs of the body of the wife by the husband; it was thought a sufficient precaution to preserve the entail, that it could not be destroyed unless *both* husband and wife concurred. That in the principal case, the limitations appeared to be anxiously worded; the concurrence of *both parties* was necessary to destroy the entail; it was out of the power of the *survivor*. He was not to look to the impropriety of what had been done, but to the power the parties had to do it, and he thought that point clear.

In a case where money, in the hands of trustees, was articled to be laid out in the purchase of lands to be settled on the husband for life, remainder to the intended wife for life for her jointure, remainder to the first and other son and sons of the marriage in tail-male successively, chargeable with 2000*l.* for younger children, remainder to the husband in fee; and the husband's father by the same articles covenanted to settle other lands on the husband, and the *heirs male of his body*, remainder to the heirs of the father: upon a question, Whether a subsequent settlement of the last mentioned lands by the husband's father, on the husband and *the heirs male of his body*, with remainder to the father in fee, was a good performance of the agreement; or whether the limitation ought not to have been on the husband *for life*, with remainder to the first and other *sons in tail-male* successively in *strict settlement*? Lord Chancellor King held, that the settlement was a *good execution* of the agreement, and therefore confirmed the settlement. He said, that by the articles those lands were not intended to be settled as a *provision for the children* of that marriage, *they* were *taken care of* by the *other part* of the articles by the trust-money; and it was not like the common case of articles for a settlement on the issue of the marriage where *no other provision* or *care is taken* for them; and the *different manner* of penning the articles in relation to the *trust-money*, and as to *those lands*, the one to be in *strict settlement* to the first, &c., son of that marriage, the other limited to the husband and the *heirs male of his body* generally, and not tied up to *the issue of that marriage*, showed plainly the parties *understood*, and had in contemplation the *difference* between a strict *settlement upon the issue of that marriage*, and a *general settlement* upon the husband and the *heirs male* of his body.

Chambers v. Chambers, Fitzgibb. R. 127; 2 Eq. Abr. 35, c. 4; ‖1 Sand. on Uses, 311.‖

And accordingly, in a case of marriage articles, where *part* of the estate was limited to the husband for life, remainder to the wife for life, and after the death of the survivor, remainder to the *heirs of the body of the wife by the husband*, another part to the husband for life, remainder to the *heirs of his body*, remainder to the wife; upon a bill filed by the eldest son to have the articles carried into execution strictly to the first, &c., son in tail, Lord Hardwicke observed, there was a difference in the penning of the two limitations: on the first they might have it in view to leave it in the power *not* of the *father only*, but *of both* to vary; but on the second there could be no sense of the limitation, but as the son contended for; otherwise it would be absolutely in the power of the father, by fine, to bar it, and defeat all the issue. They intended the wife should have a join-

ture in the one, in the other not. It seemed a strong distinction on the face of the articles, and there had been cases adjudged on that. That where by articles part of an estate was limited to father for life, to wife for life, to first and every other sons and daughters in tail, another part to testator for life, and the heirs male of his *body by that wife*, Lord Macclesfield said, if that had been the *sole limitation*, he should, without scruple, decree in *strict settlement* according to the common rule; but where the parties had shown they *knew the distinction* when to put it *out of the power of the father*, and when to leave it *in his power*, he would not vary the last limitation; decreeing to the father *in tail* as to the last, though not as to the first. That as in the principal case there was a difference in the penning of the articles, in one of which they might intend to leave it in the power of the father, in the other not in his power to do it alone, it was a reasonable way.

Howell v. Howell, 2 Ves. 358. The report in Vesey does not ascertain the case thus cited by Lord Hardwicke.

Articles were made previous to, and in consideration of a marriage, for settling lands to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body *of the wife* by the husband begotten, remainder to the husband in fee; and before the marriage a settlement was made reciting the *articles*, and expressed to be in *pursuance thereof*, limiting the lands to the use of the husband for life, remainder to the wife for life, remainder to the *heirs of the body of the husband* by the wife, remainder to him in fee. There was issue of the marriage one son; the father married again, had several other children, and having procured his son, without any consideration, to join with him in mortgaging the estate, and limiting the fee-simple and equity of redemption to the father; upon a bill afterwards brought by the son to compel his father to resettle the land on the son, after his (the father's) death, pursuant to the articles,

Lord Chancellor held it was a plain mistake in making the settlement vary from the articles, which were prudent articles; and the settlement, said to be made *pursuant thereto*, showed there was *no alteration* of the intention, nor any new agreement between the making of the articles and the settlement; and this appearing on the face of the articles and settlement, the length of time (about twenty-five years) was immaterial. And he decreed the father and his second wife to join in a conveyance to settle the estate as by the articles, viz., to the father for life, remainder to the son in tail; but as to the mortgage, the son having joined in it, the court could not set it aside, but directed the father to keep down the interest during his life.

Honor v. Honor, 2 Vern. 658; 1 P. Wms. 123.

But where marriage articles were entered into for settling the wife's estate on *the husband and wife, and* on *the heirs of their two bodies to be begotten:* after the marriage, a settlement was made of the lands upon the husband and wife for their lives, remainder to the heirs of the body of the wife by her said husband: there was issue of the marriage one daughter only; and after the death of the husband, his widow married again, joined in a fine of the lands, and settled them to other uses: a bill was brought by the daughter of the first marriage, to carry the articles into execution; for that no care was taken of the daughters by the settlement, as the limitation to the heirs of the body of the wife by her first husband made her tenant in tail; and consequently left her the power to bar them, which was contrary to the intent of the articles, that being to make an effectual pro-

vision for all the issue of that marriage. But Lord Cowper dismissed the bill; saying, if no settlement had been made, and application had been made to the court for making one pursuant to the articles, the court would have taken care to have secured to the daughters the provision intended them by the articles. But a settlement having been actually made and accepted by the parties, he could make no alteration in it.

Burton v. Hastings, Gilb. Eq. R. 113; Eq. Abr. 393.

Again, articles were entered into for settling lands to the use of B the intended husband for life, without waste, remainder to M the intended wife for life, remainder to *the heirs male of the body of B by M*, remainder to the heirs male of the body of B *by* any other wife, remainder to *the heirs female* of the body of B by the said M, with leasing and jointuring powers to B. Afterwards and before the marriage, a settlement was made, and mentioned to be *in pursuance and performance* of the articles; and the lands were thereby limited to B for life, remainder to M for life, remainder to the first, &c., son of the marriage successively in tail-male, remainder to the first, &c., son of B by any other wife in tail-male successively, remainder *to the heirs of the body of the said B by the said M*, remainder over. They had issue only one daughter, who died, leaving two daughters. B having an estate-tail under the limitation to the *heirs of the body, &c.*, suffered a recovery, sold part of the lands, devised the residue, and died. The grand-daughters brought their bill in the Exchequer against the executors of B to rectify the mistake in the settlement, in limiting an estate-tail to B, instead of limiting it in strict settlement, as by the articles it ought to have been. The articles were made in December, the settlement in March, 1685; the sale of the lands in 1698, and the will in 1722: the defendant pleaded the settlement, the recovery, the will, and the long enjoyment; but the plea was overruled by Lord Chief Baron Gilbert and the other barons; and after hearing the cause, Lord Chief Baron Pengelly and the other barons dismissed the bill without costs; it appearing to them dangerous to set aside a settlement, which seemed to have been solemnly and deliberately made. But on an appeal to the Lords, this dismission was reversed, and the lands *not sold* were decreed to be conveyed to *the grand-daughters and heirs female* of their bodies, as tenants in common, with cross remainders to them in tail female; and the devisee to account for the profits, and the executor to account for the purchase-money received by B for the lands by him sold, and to pay interest for the same; the writings to be brought into the Court of Exchequer, and possession to be delivered to the appellants; and the principal moneys arising by the said sale, to be laid out in lands, to be settled to the same uses as the lands unsold were decreed to be conveyed to.

2 P. Wms. 349, West v. Errissey. ‖See Randall v. Willis, 5 Ves. 262; Horne v. Barton, Cooper, 257;‖ 3 Bro. Cas. Parl. 327.

Marriage articles were entered into for settling lands to the use of the husband D for life, without waste, remainder to trustees and their heirs during his life, to support contingent remainders, remainder in part to the wife E for her jointure, remainder as to the whole to first, &c., son of the marriage, in tail-male successively, remainder to the *heirs male of the body of the husband*, (*i. e.* by any wife,) remainder to the *heirs of his body by his said wife E*, remainder to his own right heirs, with a clause empowering husband and wife to make leases; and also a clause, that if he should die

without issue male by his said wife, if there should be one daughter, she should have 3000*l.*, and if there were more daughters than one, they should have 4000*l.* among them; which portions were to be secured on some part of the estate. It happened there was issue of the marriage only one daughter. D survived his wife, and suffered a common recovery of the lands, and made another settlement of them in consideration of, and previous to, his second marriage; subject as to part to a trust for raising 3000*l.* for his daughter by his first wife, in satisfaction of the portion she was entitled to under the first articles, and maintenance for her in the mean time. The question was, (here being notice of the first articles,) whether the limitation in the first articles *to the heirs of the body of D by E his wife*, should not be taken as if it had been to the daughters of D by his said first wife? For then they could not be barred by the recovery considering the preceding intermediate limitation to the heirs male of his body at the same time as words of purchase. It was insisted, that here the limitation to the heirs of the body of D by E his first wife, must be the same as if it had been to the *daughters:* for it could not be intended in favour of the sons of that marriage, there being an express limitation before to them; and though in the case of a settlement, there being a precedent estate for life to D, it would have been an estate-tail in him barrable by the common recovery, yet it was otherwise where it rested upon articles; and the case of West v. Errissey was cited. (*Suprà.*)

Powell v. Price, 2 P. Wms. 535.

On the other side it was said, and resolved that the 3000*l.* secured by the settlement on the second marriage, was an actual satisfaction of all demands under the articles; and that though a limitation by articles to the *heirs male* of the marriage, after an express estate for life to the father, should be taken to mean a remainder to the first, &c., son, it does not follow that a limitation to the *heirs of the body* must be equivalent to a remainder limited to daughters; especially in this case, where they were postponed to the limitation to the heirs male of the body of D by any wife; and where there was an *express pecuniary provision* made for the daughters by the first wife; which was all they were to depend upon.

And the following diversities were taken by the court, between this last case and the case of West and Errissey; in the case of West and Errissey, no portions were provided for the daughters of the first marriage; in the last case, portions in all events were secured to such daughters. In the case of West v. Errissey, after the limitation in the articles to the *heirs male* of the body of the husband and wife, and the remainder to the *heirs male* of the body of the husband by any wife, came the remainder to the *heirs female* of the body of the husband by the first wife, &c., so that the daughters were more immediately in the view and contemplation of the parties than in the last case.

See Fearne's C. R. 106, (7th edit.)

An estate was articled to be settled on the husband for life, *sans* waste, remainder to the heirs male of his body, with power to raise portions for younger children. A settlement was afterwards made, before marriage, *in pursuance of the articles*, and observing the very words of the articles. The husband afterwards levied a fine to the use of himself in fee, and by will made a provision for his son's debts. Lord Hardwicke said it was the common case; the variation from the intent of the articles, and from the ordinary course of settlements not arising from any new agreement,

(H) What Estate Trustee shall convey, and to whom.

(being made *in pursuance* of the articles,) but from mistake in not attending to a strict settlement. The reason of which was unanswerable, viz., that on a settlement for valuable considerations, to make the father *tenant in tail* would be nugatory, and the same as making him tenant in fee. But the son having submitted to and taken a benefit under his father's will, must be bound thereby; and therefore, though he was entitled to have the settlement rectified according to the true intent of the articles, he could not retain both, but must make his election.

Roberts v. Kingsley, 1 Ves. 238. Vide 1 Bro. Chan. Ca. 587, of election in these cases.

By articles previous to marriage, it was agreed that 3000*l.* should be laid out in the purchase of a freehold estate, to be settled on the husband for life, remainder to the wife for life, remainder to the use of such issue of their bodies, in such parts and manner as the husband and wife should by deed or writing appoint; and for want of appointment to the use of the *issue of their bodies*, remainder to the right heirs of the husband. There was no provision for younger children. The husband died without appointment, leaving his wife and two sons and a daughter. Upon a bill by the eldest son to have the money laid out, according to the articles in land to be settled on him in tail, remainder to his brother and sister in tail, with reversion in fee to himself; and a cross bill by the younger children to have the lands to be bought, settled on them equally with the eldest son. The Master of the Rolls was of opinion, that the lands to be purchased ought to be settled in strict settlement, and limited to the first, &c., sons in tail, with remainder (the daughter being dead without issue) to the right heirs of the husband; and decreed accordingly.

Dodd v. Dodd, Ambl. R. 274.

Lord Talbot laid it down as a rule, that where articles are entered into before marriage, and a settlement made *after marriage*, different from those articles, (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail,) the court will set up the articles against the settlement. But, where both articles and settlement are *previous* to the marriage, at a time when all parties are at liberty, the settlement, differing from the articles, will be taken as a new agreement between them, and shall control the articles. And although in the case of West and Errissey the articles were made to control the settlement made *before* marriage, yet that resolution did not contradict the general rule; for in that case the settlement was expressly mentioned to be made *in pursuance and performance of the said marriage articles*, whereby the intent appeared to be still *the same* as it was at the making of the articles.

Ca. temp. Talb. 20, Legg v. Goldwire. {See 5 Ves. J. 262, Randall v. Willis.}

Articles were entered into for settling an estate to the husband for life, after his death to his intended wife for her life, and after her death to the use of *the heir male of the husband to be begotten on the body of the wife*, afterwards, and before marriage, by a settlement declared to be in *part performance of the said articles*, the lands were settled upon the husband for life, then to the wife for life, and after her death to the use of the *heirs male* of the husband begotten on the body of the wife. Afterwards the marriage took effect, and the husband suffered a common recovery, and mortgaged the land in fee; which mortgage was afterwards assigned to another mortgagee. After the father's death, his eldest son brought his bill for an ac-

count of the rents and profits, and for possession, and to have the full benefit of the marriage articles; insisting that his father was intended to be tenant for life only, with remainder to his first and other son and sons successively in tail; that he was a purchaser under those articles, and they ought to be considered as if they had been strictly carried into execution. The mortgagee denied notice of the articles, and insisted on his being a purchaser for valuable consideration. Lord Hardwicke said it was certainly true, from the general principles of the court, that if articles on marriage are to settle an estate to A for life, remainder to his wife for life, remainder to the heirs male of the body of A, it is taken in that court to be in *strict settlement*, and an estate for life only in the father and mother; and if the settlement be made after marriage, it shall be rectified by the articles before;—that the case of West and Errissey was both upon articles and a settlement before marriage; and was the first case where the court altered a settlement, and made it conformable to articles, and relieved on the head of mistake, *the settlement referring expressly to the articles*. But that was between the parties to the articles and settlement, and their representatives, and *mere volunteers;* and had not been carried into execution against a *purchaser;*—that it was true, the court had given relief against persons who claimed under the settlement and their representatives; but no case had gone so far as to relieve against purchasers. He also observed, that there was no case, but where there are *articles as well* as a settlement, in which the court will construe words which make a legal estate-tail, to be carried into strict settlement. And upon the whole, Lord Hardwicke, after delivering his opinion that there was not sufficient proof of notice of the articles in the assignee of the mortgagee, dismissed the bill so far as it prayed to be relieved against the mortgage; but decreed that the plaintiff might be at liberty to redeem.

Warwick v. Warwick and Kniveton, 3 Atk. 291; Glanville v. Payne, 2 Atk. 39, S. P. ‖See Senhouse v. Earl, Ambl. 285; and see 9 Ves. 583; *per* the Master of the Rolls.‖

And the court have refused to rectify a settlement according to articles, for want of the production of the articles themselves. The articles were previous to marriage, for settling, by the wife's father, certain estates to the use of the husband and wife for their lives, and the life of the survivor, and after the death of the survivor, to the use of the *heirs of the body* of the husband on the wife, remainder over. A settlement was made after marriage *reciting* the articles, and said to be made in consideration of the marriage, and *pursuance and performance of the articles*. Upon a bill by a son of the marriage, to have the articles carried into execution, Lord Hardwicke dismissed it, for want of the articles being produced; by which alone, he said, he could alter the settlement. It was impossible, he said, for him to determine otherwise, unless the *whole of the instrument* was before him; for the true construction depended on *words;* and *other parts* of the deed might be *material* to find out the true meaning. He could not see reason to lay it down as a rule, that in *all cases* of *articles*, the husband was to be only tenant for life.

Ambl. R. 515. ‖See Hardy v. Reeves, 5 Ves. 426;‖ and vide Ambl. R. 218.

The husband, upon his marriage, covenanted to levy a fine of freehold, and surrender copyhold lands to the use of himself for life, remainder to his wife for life, remainder to the heirs male of his body by his wife, re-

mainder to the *heirs of their two bodies.* He afterwards died, without levying the fine or making the surrender, leaving a son and a daughter by his wife. The son afterwards, for indemnifying some sureties for him, covenanted to levy a fine of the freehold, and surrender the copyholds; and died, having surrendered the copyhold, but without levying a *fine* of the freehold. Upon a bill by his sister and her husband to have the freehold and copyhold lands assured to her according to the *intent of the settlement*, Lord Harcourt considered the deed by the father in the *nature of articles*, to be executed in a stricter manner than in the words of the deed, and that a *remainder* might be limited to the daughters; so that a fine by the sons could not have barred it. But upon a rehearing before Lord Cowper, he held that the settlement, by the deed to lead the uses of the fine, was not to be considered *as articles*, but a *defective settlement*, and the uses *not to be altered or varied:* but that a court of equity would *assist* it so far, as to consider it as if a fine had been levied (by the husband,) and then the plaintiff would not have been barred *without a fine* (by her father,) and she was to be considered as *heir of the body* of her father. And that the limitation in the deed to the heirs of the bodies, could be inserted for no other end or purpose, but to carry the estate to the *daughters of the marriage;* it being before limited to the *heirs male;* and therefore he confirmed the decree as to the *freehold.* But, as to the *copyhold*, there appearing no particular custom in the manor for suffering a recovery, he held the surrender (by the son) would have barred the *entail*, in case the copyhold had been well settled; and therefore varied the decree, and dismissed the bill as to that.

White v. Thornburgh, 2 Vern. 702.]

W B devised 300*l.* to her daughter M to be laid out by her executrix in lands, and settled to the only use of her daughter M and her children; and if she died without issue, the lands to be equally divided between her brothers and sisters then living: the plaintiff married M the legatee, and had issue by her, but she and her child being both dead, and the money not laid out in land, the bill was, that the plaintiff might either have the money laid out in lands, and settled on him for life, as being tenant by the curtesy, or, in lieu of the profits of the lands, might have the interest of the money during his life. It was held by the court, that if it had been an immediate devise of land, M the daughter would have been by the words in the will tenant in tail, and consequently the husband would have been tenant by the curtesy; and in case of a voluntary devise, the court must take it as they found it; although upon the like words in marriage articles it might be otherwise, where it appeared the estate was intended to be preserved for the benefit of the issue, and therefore decreed the money to be considered as lands, and the plaintiff to have the interest or proceed thereof for his life, as tenant by the curtesy.

2 Vern. 536, Sweetapple v. Bindon. ‖ See Cunningham v. Moody, 1 Ves. 176.‖

[So, upon a devise for the settling of lands on A for life, and after his decease to the *heirs male of his body*, and the *heirs male of the body of every such heir male, severally and successively as they should be in priority of birth and seniority of age*, remainder to B. In arguing the question, Whether A was tenant for life only, or in tail, the common case of marriage articles was cited, where, though they were so worded as to give the husband an estate-tail, yet the court had decreed a settlement on

the husband for life only, and then upon the first and other son and sons, &c. Upon which part of the argument Lord Keeper observed, that where *settlements were agreed to be made upon valuable consideration*, the court would aid in artificial words, and make an artificial settlement: but he never knew it done *for a bare volunteer.*

Legat v. Sewell, 1 Eq. Abr. 395. ‖See Blackburn v. Stables, 2 Ves. & B. 367; Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 559. The late Mr. Fearne thought that a power of selling, not expressly authorized by marriage articles, might be introduced into a settlement made in pursuance of them, and would be supported in equity; but it has been decided in a late case, that the introduction of a power of selling in a settlement was not authorized where the will was silent as to the power. Wheate v. Hall, 17 Ves. 80; Brewster v. Angel, 1 Jac. & Walk. 625. See Fearne's Post. Works, 309, and 2 Ves. and B. 311.‖

Lands were devised to trustees and their heirs for payment of debts and legacies, and afterwards to *settle* what should remain unsold, one moiety to the testatrix's son H, and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F, and the heirs of his body, with remainders over; taking special care in *such settlement*, that it should *never be in the power* of either of the sons to *dock the entail of either of their moieties.* Upon a question, whether the sons were entitled to have estates-tail conveyed to them, or only estates for life? the court held, that the sons must be made only tenants for life, and should not have estates-tail *conveyed* to them: but their estates for life should be without impeachment of waste. Because in that case an estate was *not executed*, but only *executory;* and therefore the intent and meaning of the testatrix was to be pursued. She had declared her mind to be, that her sons should not have it in their power to bar their children, which they would have, if an estate-tail were to be conveyed to them. And the court took it to be as strong in the case of an *executory* devise for the benefit of the issue, as if the like provision had been contained in marriage-articles; but had she by her will devised to her sons an estate-tail, the law must have taken place; and they might have barred their issue, notwithstanding any subsequent clause or declaration in the will, that they should not have power to dock the entail.

Leonard v. Earl of Sussex, 2 Vern. 526.

Again, A devised a sum of money to trustees in *trust*, to be laid out in lands, and to be settled on B *for life without impeachment of waste*, remainder to trustees and their heirs during the life of B, to support contingent remainders, remainder to the *heirs of the body of B*, remainders over, with a power to B to make a jointure. The universality of the rule respecting the union of the limitation to the ancestor for life, with that to the *heirs of his body*, &c., was urged in support of B's being entitled to an estate-tail in the lands to be purchased. To which it was answered, that the rule in construction of wills was, that the intention of the party ought to take place, however improperly expressed. That it would be a downright violation of the testator's intention, to construe the estate devised to B to be an estate-tail. For 1st, the estate was devised to B for *his life* expressly; 2dly, it was to B *without impeachment of waste*, which would be vain words, if B were to have more than an estate for life; 3dly, the estate was devised to trustees, *during the life of B*, to preserve *contingent remainders*, so that the testator expressed his intention that the remainders limited to the issue of B should *be contingent remainders;* and

what could be more contradictory to this express and plain intent, than to say those remainders should not be contingent, but give a vested estate-tail to B. As to the notion that the *conveyance directed by a will* should be in the words made use of in the will, it was impossible that rule could universally hold; for suppose the direction of the will was, that the trustee should convey the lands to A for life, remainder to B *for ever;* this, in a deed, would not convey *a fee*, as it would in a will; and therefore, there was no necessity that the words in *the conveyance* should pursue those *in the will.* So, if the words of the will had directed the estate to be conveyed to A for life, remainder to the *issue of his body*, (he having none at that time born,) this would be an *estate-tail* in a will, but in a *deed* it would not be so. Again, if the words in a will were that the *conveyance* should be to A and his heirs male, this would be an estate-tail; but put such words into a *deed*, and there, for want of saying of *whose body* the heir must be, they would give a fee simple; to which the court agreed. And the Lord Chancellor King declared the court had a power over the money directed to be invested in land: that the diversity was between the will's passing a *legal* estate and leaving the estate *executory*, so that the party must come into the Court of Chancery, in order to have the benefit of the will: that in the latter case the intention should take place, and not the strict rules of law: and he decreed that B should have but an estate for life on the lands to be purchased.

2 P. Wms. 471, Papillon v. Voice. Vide Earl v. Stamford v. Sir John Hobart, *infrà.*

In another case, of a devise to trustees and their heirs, in trust till the marriage or death of the testator's grand-daughter, to receive the rents and profits, and pay her an annuity for her maintenance; and as to the residue to pay his debts and legacies, and after payment thereof, in trust for his grand-daughter; and if she married a protestant, after her age, or with consent, &c., then to *convey* the estate after such marriage to the use of her for life, *without impeachment of waste*, remainder to her husband *for life*, remainder to the *issue of her body*, with several remainders over. A question arose, whether under the will the testator's grand-daughter (Lady Glenorchy) was tenant for *life* or *in tail?* which depended on two points: 1st, Whether the words of the will, in an *immediate devise* of a legal estate, would have carried an estate-tail? 2dly, If so, whether the court would make any difference between a *legal* title and a *trust estate executory?*

Ld Glenorchy v. Bosville, Ca. temp. Talb. 3, 19.

Lord Talbot said, he should upon the first question have made no difficulty of determining it an *estate-tail*, had it been the case of an *immediate devise.* He thought, in cases of *trusts executed*, or immediate devises, the construction of the courts of law and equity ought to be the same, for *there* the testator did not suppose any *other conveyance* would be made. But in *executory trusts* he left something to be done; the trusts to be *executed in a more careful and more accurate manner.* That in the case of Legat and Sewell, the words, "if in a settlement," would have made an *estate-tail;* and in that of Bailie v. Coleman, the execution was to be of the *same estate* he *had in trust;* which, in construction of law, was an estate-tail. That the case of Papillon and Voice seemed a strong authority for executing the intent in *executory trusts* as well as in articles;

and he accordingly decreed the Lady Glenorchy but an estate for life, with remainder to her first and other sons, &c.

Sir John Maynard, after devising his estates in remainder after the decease of his wife (afterwards Countess of Suffolk) to trustee and their heirs, he directed them, *after his wife's decease*, to *convey* certain parts thereof to the use of, or in trust for, Sir H. Hobart and Elizabeth his wife, for their lives, and the life of the longer liver of them; the remainder to the *first son* of the said Elizabeth for *ninety-nine* years, if he should so long live; the remainder to the *heirs male of the body of such first son:* the remainder to all and every the sons of the said Elizabeth for ninety-nine years, if every such son respectively should so long live; the remainder to the *heirs male* of every of them, to take, not jointly, but successively, one after the other, according to the births of each of them; each son to take the term of ninety-nine years, with *immediate remainder to his said heirs male;* the remainder thereof to Mary Maynard (afterwards Countess of Stamford) for her life; the remainder thereof to all and every her sons for such like term of ninety-nine years, and with remainder to the heirs male of the body of every such son immediately after each term. The testator left the said Elizabeth Hobart and Mary Maynard his grand-daughters and co-heirs at law, who neither of them had any issue male at the time of his decease. Afterwards, on some disputes between Sir H. Hobart and his lady, Lord Stamford and his lady, and the Countess of Suffolk, an act of parliament was obtained, whereby it was enacted that the real estate, by the said Sir John Maynard's will given or appointed, *should go unto, and be held and enjoyed by such person and persons, to and for such estates and interests, and under and subject to such charges, limitations and appointments, and in such manner and form as was in the said will expressed.* And the said trustees were thereby authorized and empowered to *convey* the said manors and lands *immediately*, unto such person and persons, and for such estate and estates, as the same were in and by the said will limited and appointed to be conveyed, as if the said Countess of Suffolk *were dead.*

Earl of Stamford v. Sir John Hobart, 1 Bro. Parl. Ca. 288; ‖3 Bro. P. C. 31, ed. 1803.‖

After the decease of Sir H. Hobart and his wife, upon a bill filed by Sir John Hobart, their only son, the trustees were directed to convey the lands *according to his will and the words of the act of parliament.* And a draft of conveyance being accordingly settled by the master to trustees, *habendum* to them and their heirs, *to the several uses, intents, and purposes in the said will and act of parliament limited, expressed, and declared, and to and for no other use, intent, or purpose whatsoever;* the plaintiff excepted to it, for that the premises ought, at least, to have been limited to the *use* of the said trustees and their heirs; and only in *trust* for such person and persons, and such estate and estates, as were in and by the said will and act of parliament limited; whereby the *legal estate* might be vested in the said trustees, for the better preservation of the *contingent limitations*, which otherwise, as the draft was prepared, were liable to be destroyed, and the testator's intention plainly defeated.

Upon the hearing of this exception, Lord Chancellor Cowper declared, "that in matters *executory*, as in cases of articles, or a will *directing a conveyance*, where the words of the articles or will were improper, or informal, that court would not direct a conveyance according to such improper or informal expressions in the articles or *will;* but would order the *conveyance*

or settlement to be made in a proper and legal manner, so as might best answer the *intent* of the parties; and in that case his lordship conceived the true intent of the will to be, that the estates should be *secured*, as far as the rules of law would admit, to the issue male of the respective devises, and that it was designed to be as strict a settlement as possible by law." His lordship therefore decreed, that in the said conveyance, where any part of the estate was limited in use to the plaintiff for ninety-nine years, if he should so long live, there should be a limitation over to trustees and their heirs *during his life*, to preserve the contingent uses in remainder; and then to the first and other sons of the plaintiff in tail-male successively.

Upon an appeal to the Lords from this *last decree*, it was contended, among other things, that the act of parliament, which was so very express in confirming the estates appointed by the will, could never intend that a court of equity should have power to *direct* a conveyance to *other uses* than what were *mentioned in the will;* but the decree complained of did so, and was therefore repugnant both to the will and act of parliament, as well as to the *former decree*. To this it was answered, that in cases of *executory articles*, for the settling of estates, in prospect of *future conveyances* to be *afterwards made*, it was usual for courts of equity to help informalities and supply defects, especially when the things supplied were necessary to *support the main intent* of the parties, and to carry such articles into execution, according to that intent, so far as it might agree with law, though not strictly according to the words and penning of the articles; and *a fortiori* would courts of equity do so in the case of *a will*, where the same was only *executory* by a *conveyance to be made*. That the act of parliament made *no alteration* in the *will*, in the point in question; it only hastened the time for the trustees to convey, even in the lifetime of the Countess of Suffolk, and in some other particulars not relative to the question. But in all other respects the act *confirmed the will*, and being strictly *relative to it*, the intent of the will ought to be the *rule for the conveyance*. The decree was accordingly affirmed by the Lords.]

‖ Both in wills and marriage settlements cross remainders may be raised by implication. In the case of the Duke of Newcastle v. Earl of Lincoln,(*a*) a conveyance was made before and in consideration of marriage, of real estates, in strict settlement, with a covenant to assign leasehold estates to trustees, in trust for such person or persons, and for such or the like ends, intents, and purposes as were therein before mentioned, of and concerning the said estates, &c., as far as the law would in that case permit. Lord Rosslyn thought that the settlements should be so framed that no person being tenant in tail by purchase should become entitled to a vested interest in the leasehold estate till he attained twenty-one, or, dying under that age, unless he left issue inheritable to the entail.

Green v. Stephens, 12 Ves. 419; 17 Ves. 64; Marryatt v. Townley, 1 Ves. 102, 104; Twisden v. Lock, Ambl. 663; Richmond v. Cadogan, cited 17 Ves. 67; West v. Errissey, 2 P. Wms. 349; Horne v. Barton, Cooper, 257. (*a*) 3 Ves. 387; 12 Ves. 218; Gower v. Grosvenor, Barn. 54; 2 Ves. & B. 63.‖

[In a case where one by deed conveyed his freehold land to trustees and their heirs, and his leasehold to trustees and their executors, upon trust to apply the rents and the benefit of the redemption to W for life, and after her death to the *heirs of the body of the* said W, and of G and of M, *their heirs, executors, and assigns*, during the continuance of the estate in the premises; upon a question, Whether W took for *life*, or in *tail?* Lord

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Talbot held, that she took an estate *for life*, and that the heirs took by purchase. In which case we may observe, the limitation to the heirs of the body of W was blended with that to the heirs of the bodies of several others, who could take no otherwise than by purchase; and there were words of limitation not only to the heirs, but to the *assigns* of all the said heirs of the bodies alike.

Allgood v. Withers, in Chanc. in 1735, cited 2 Burr. 1107; 1 Ves. 150; 2 Atk. 582; 2 Ves. 648; and vide Ashton v. Ashton, cited 1 Ves. 149; 2 Atk. 582.

A devised lands to five trustees, their heirs and assigns *in trust*, by rent and profits, *sale or mortgage*, to pay his debts, &c., and *after payment thereof*, he devised the same estates to three of the same trustees, their executors, &c., for 500 years, upon trust to pay his legacies, and an annuity of 200*l.* *per ann.* to his sister for life; and after the determination of the said estate for years, he devised the same premises to all the said trustees and their heirs in trust, as to a moiety, to the use of T his nephew for life, without impeachment of waste; and after the determination of that estate, to the trustees and their heirs during the life of T to support contingent remainders, and after his decease to the use of the heirs of the body of T lawfully begotten, and for want of such issue, then to the use of his nephew B for the term of his *natural life*, without impeachment of waste; and after the determination of that estate, *to the same trustees during the life of B to preserve contingent remainders*, and after his decease, then to the use of *the heirs of the body of B* lawfully begotten, with like remainders to other nephews. The first devisee T died without issue; upon whose decease B, the next in remainder, filed his bill against the trustees and all proper parties, praying, amongst other things, to be let into possession of a moiety of the estates: afterwards B dying pending the suit, his widow and devisee brought a bill of revivor and supplemental bill, charging that B in his life-time, by bargain and sale enrolled, conveyed his moiety of the estates to two persons and their heirs, to make them tenants of the freehold, and suffered a recovery thereof (in which he was vouched) to the use of himself in fee; and afterwards devised his said moiety to his said widow in fee, and died without issue. The general question between the parties was, Whether an *estate-tail*, or an estate for *life* only, passed by the will of A to B? It was insisted for the plaintiff, that it was an estate-tail; upon the general rule, that where lands are limited to a man for life, with a limitation in the same deed or gift to the heirs of his body, that this makes an estate-tail, and that a devise of lands in the same way passed the same estate: that the limitation was either a *legal estate*, or a *trust vested or executed*, and not *executory*. On the other hand it was contended, that those rules were artificial, not founded in justice, but for support of the feudal tenures, and therefore the judges ought to show themselves *astuti* in supporting exceptions to such rules. The Master of the Rolls, however, held it to be a *trust*, and *not a legal estate;* but decreed that B was entitled to an *estate-tail* in the moiety so devised to him; as it was the case of an immediate devise, and not a devise of lands *to be settled*. Upon an appeal to Lord Hardwicke from this decree, he agreed that this devise was only *a trust* in equity; the devise being to *trustees and their heirs*, which carried the whole fee in point of law, and the devise *to sell* being sufficient to carry the fee, if the word *heirs* had been omitted; and therefore the whole fee being in the trustees, no *legal* remainder could be limited to B; and as to its being considered as an *executory devise* to B, (which, it seems, had

been contended at the bar,) it was too remote to be good in that view, being after all debts indefinitely paid, which, in point of time, might exceed a life or lives in being, or any other time allowed by law; and besides, in *that case* the recovery by B being before the debts were paid, and consequently whilst the legal fee remained in the trustees, B could make no good tenant to the *præcipe;* and that would prevent it from passing by B's will: for whatever made that recovery void equally defeated the plaintiff's title: which made it necessary for the plaintiffs to admit that all the devises subsequent to that to the trustees were *trusts* in equity. That the main question, whether it was an equitable *estate-tail*, or for *life* only, depended on the construction of the words *heirs of the body*, whether they should be taken as words of limitation or of purchase. That the intent was clear that they should be taken as words of purchase, from the clause *without impeachment of waste*, and the limitation to trustees *to support contingent remainders*. That there were several cases even at law, where they had been taken as words of purchase, as Archer's case; that the words of limitation added there, and in all such cases, were only demonstration of the intent of the testator in using the first words. That the case of Colson and Colson, which was objected as an authority, that the interposition of trustees to support contingent remainders is not sufficient to turn these subsequent limitations to the *heirs of the body* into words of purchase, differed from the principal case; here being (in the principal case) a clause without impeachment of waste; although that might be thought of little weight; but the *great difference* was, that *this* was a devise of a *trust in equity*, *that* of a mere *legal* estate, *the words of which must be taken as they stood according to the strict legal determination*. That here all the limitations were the direction of a *trust*, which the court was bound to carry into execution according to the intent of the testator.

1 Ves. 142; 2 Atk. 246, 570, 577, Bagshaw v. Spencer.

That as to the difference between trusts *executed* and *executory*, the distinction had never been established by any direct resolution. That all trusts in notion of law were executory, and to be carried into execution by the court by *subpœna*. That if B had himself come to have a conveyance decreed him, the question would have been, whether the court should have inserted trustees to support contingent remainders; if they had not, they would have departed from the words of the will; if they had, the remainder must have been to first, &c., son and sons in strict settlement, for otherwise there would have been no remainders to be preserved; and therefore, if the court must at all events depart from the words of the will, such departure must rather be to support than to frustrate the plain intent of the testator. For these reasons Lord Hardwicke reversed so much of the decree at the Rolls as gave B an estate-tail under the will.

Sed vide Wright v. Pearson, Ambl. 358; but more fully Fearne's C. R. 187. ‖1 Eden, R. 119;‖ Austen v. Taylor, Ambl. 376; Jones v. Morgan, 1 Bro. Chan. Ca. 206.]

‖ In a recent case, there was a devise to trustees and their heirs of real estates in trust, to demise or let all the testator's freehold estates for any term they should think proper, and to pay one-third of the rents to the testator's wife for life, and the remaining two-thirds, and after the decease of the wife, the first mentioned one-third part to the testator's daughter for life, for her separate use, independently of her husband; and after the death of the daughter, the testator bequeathed all his freehold estates to her

children, equally to be divided among them at their respective ages of twenty-one years. This was held to be a devise of the legal fee to the trustees, and not a mere power of leasing, nor a determinable fee.

Doe dem. Tomkins v. Willan, 2 Barn. & Ald. 84.

In the late case, however of Warter v. Warter, Thomas Meredith, by his will, dated 8th of September, 1801, (after directing payment of his debts and funeral expenses,) devised his capital and other messuages, tenements, lands, and hereditaments, with their respective appurtenances, charged with two annuities, to trustees, their heirs and assigns, until his nephew, John Warter, the son of his sister Margaretta Warter, should attain the age of twenty-one years; and if he should die in the mean time, until Henry Warter, the second son of the said Margaretta Warter, should arrive at that age; and if the said Henry Warter should die in the meantime, until the daughter of the said Margaretta should arrive at that age, upon trust, among other things, to *raise* out of the rents and profits of the premises, or by *sale* or *mortgage* thereof, or of a competent part thereof, the full sum of 2000*l.*, together with all costs and charges attending the raising of the same, and to pay the same to the said Henry Warter, the younger son of his sister, M. Warter, as soon as he attained the age of twenty-one years; and if his sister should happen to have more than one younger child, to raise out of the rents, issues, and profits of the premises the full sum of 3000*l.*, and pay the same to and amongst such younger children, share and share alike, as soon as they should severally attain their ages of twenty-one years; and upon further trust, to pay and apply a proper sum of money, arising from the rents and profits of the premises, for the maintenance and education of his nephew, John Warter, till he should arrive at the age of twenty-one years; and when John Warter should attain that age, to pay him the residue of the rents, issues, and profits of the premises, if any should remain after performance of the before-mentioned trusts; and if John Warter should happen to die before he attained the age of twenty-one years, then to pay and apply a sufficient sum of the money arising from the rents and profits of the premises for the maintenance and education of his nephew, Henry Warter, till he should attain the age of twenty-one years; and, when Henry Warter should arrive at that age, then upon trust, to pay him the rest and residue of the rents, issues, and profits of the premises, if any should remain after performance of the before-mentioned trusts; and in the mean time to place out the money arising from the rents and profits of the premises at interest, for the benefit and advantage of his said nephew; and when and as soon as John Warter should attain the age of twenty-one years; or, in case of his death, when and as soon as Henry Warter should arrive at that age; or, in case of his death, when and as soon as the daughter of Margaretta Warter should arrive at the age of twenty-one years, he gave and devised the premises, with their respective appurtenances, subject as aforesaid to the said trustees, their heirs and assigns, to the use of his nephew, John Warter and his assigns for life, *sans* waste, remainder to trustees to preserve contingent remainders; and after the decease of John Warter, to the use of the first, second, and third, and all and every other son and sons of the body of John Warter, lawfully issuing, severally and successively in tail-male, with remainder to his first and every other daughter successively in tail, with remainders over.

Warter v. Warter, 2 Bro. & B. 349; and see Sand. on Uses, c. 2, § 8, (4th edit.)

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John Warter died under the age of twenty-one years, leaving a widow, Jane Warter, and also Margaretta Elizabeth Meredith Warter, his only child and heir at law, him surviving.

The judges of the Court of Common Pleas certified, that, upon the death of John Warter under the age of twenty-one years, Margaretta Elizabeth Meredith Warter, his only child, became and is now entitled to the devised estate and premises as tenant in tail-male of the *legal* estate.

From this certificate it is clear, that the judges did not consider the legal estate in fee simple to have been vested in the trustees, although there was an express trust to sell or mortgage. The same construction seems to have been adopted in Hawker v. Hawker. It is possible, that, in both cases, the judges considered the trust to sell or mortgage in the nature of a power; for, if a purchaser or mortgagee were to derive title from the estate vested in the trustees under the trust, to sell or mortgage that estate must necessarily have been an absolute fee-simple; for, if the legal fee, when vested in the trustees, was in its nature determinable, the purchaser deriving title under them must take an estate commensurate to that which the trustees held, and his estate would therefore be also determinable.

3 Barn. & Ald. 527. See 7 Term R. 342, 433, and Sand. on Uses, 260, (4th edit.)‖

[One devised lands to trustees and their heirs for payment of debts and legacies, and, after debts and legacies paid, willed that one-fourth part should be and remain in trust for E for life, with power of leasing; and after her decease, in trust for C *for and during the term of his life*, with like *power of leasing*, and after his decease to the *heirs male* of the body of C, remainder over. Now this was the devise of a *trust;* and Lord Cowper conceived that it differed from an *immediate devise*, and that it was rather to be looked upon in the nature of an executory devise, to take effect after debts paid, which were considerable; or in nature of marriage articles: besides, that the enabling C to make leases, seemed to imply very strongly that he was to have no power to dispose of the inheritance. But the cause coming on before Lord Harcourt upon a re-hearing, he said the case of a will *differed* from the several cases of marriage articles, in the nature of which the issue were particularly considered, and looked upon as purchasers. That in case of a *will*, where the parties claim voluntarily, the testator's intent must be presumed to be consistent with the rules of law: that at law those words would certainly create an estate-tail; and it could not be inferred (with any certainty) from the power of leasing, that no estate-tail was intended; such power being more beneficial than that given to tenant in tail by the statute; and as the debts were admitted by the pleadings to be all paid, the same construction was to be made as if there had been originally no trust; and so decreed A's share to be conveyed to him and the heirs male of his body, remainder over.

Bale v. Coleman, 2 Vern. 670; 1 P. Wms. 142. ‖ See the Master of the Rolls' argument in Blackburn v. Stables, 2 Ves. & Bea. 367, 370, and Jervoise v. Duke of Northumberland, 1 Jac. & W. 559.‖ Peere Williams states it as a devise to four persons for *payment of debts*, afterwards to the use of them and their heirs; and that the testator by codicil devised that his will should stand, saving that one of the said devisees should have his estate for life, with power of leasing, remainder to the heirs male of his body. But considering the first devise for *payment of debts*, the devisee's *beneficial* interest in either state of the case appears to have been in the nature of a *trust*. 1 P. Wms. 242.

Where there was a devise of lands to a trustee, *in trust* to pay the rents and profits to S for her separate use for life, as if she were sole; and after her decease to pay the same to E *her son for life*, and afterwards to pay

the same *to the heirs of his body*, and for want of such issue, to pay the same to all and every other son or sons of the body of S begotten, &c.: upon the question, whether E was entitled to the lands in tail, or for life only, Lord Hardwicke proceeded on this principle, viz., that in limitations of a *trust*, either of a real or personal estate to be determined in that court, the construction ought to be made according to the construction of limitations of a *legal* estate, unless the intent of the testator or author of the trust *plainly* appears to the contrary. He laid it down as a rule (he said) that he was not, in a court of equity, to overrule the *legal* construction of the limitation, unless the intent of the testator or author of the trust appears by declaration plain, that is, by *plain expression* or *necessary implication*. And upon this ground Lord Hardwicke decreed a conveyance in tail to B of the real estate so devised.

Garth v. Baldwin, 2 Vesey, 646.]

A surrender was made of an estate of the nature of *borough English*, to the use of trustees, in trust after payment of an annuity and some particular debts, to surrender the same to the use of the heirs of the body of the husband and wife. The husband and wife had two sons; and when the annuity, &c., were at an end, they each of them claimed the surrender in their favour; the eldest son as heir of the body by the common law of England, and the younger as heir by the custom of *borough English*, of which nature this estate was. But, as this was a trust merely executory, the court directed a surrender to be made to the eldest son, as heir general by the common law.

Starkey v. Starkey, in Exch. Trin. 19 G. 2, MS. Rep.; [Roberts v. Dixwell, 1 Atk. 610, a similar decision by Lord Hardwicke on an estate in gavelkind.]

‖ Where a settlement was made of money upon trust, to be transferred to the surviving parent, for the benefit of him or her and any child or children of the marriage, it was held, on the construction of the whole settlement, that the surviving parent took for life, with remainder to the children.

Chambers v. Atkins, 1 Sim. & Stu. 382.

Where a will directed a settlement to be made of real estate on A and his first and other sons in tail, with power of jointuring, leasing, sale, and exchange, and all other powers, &c., usually inserted in similar settlements, it was held that these last words did not authorize the insertion of a power to charge with portions.

Higginson v. Barneby, 2 Sim. & Stu. 516.‖

β When a property is given absolutely, with a recommendation as to its disposal in favour of others, in such terms as ought to be construed imperatively, and the objects of the recommendation are certain; held to create a trust in their favour.

Knight v. Knight, 3 Beav. 148.

Where a father bequeathed a legacy to his daughter, the wife of B, recommending the daughter and husband to settle it, together with such sum as the husband should choose, for the benefit of the wife and children; held, to constitute a trust for the children.

Ford v. Fowler, 3 Beav. 146.

Property held in trust does not pass to the representatives of the trustee; and as long as it can be traced and distinguished, it inures to the benefit of the *cestui que trust*.

Moses v. Murgatroyd, 1 Johns. Ch. R. 119, 473.

(I) Trustee where favoured, and where to account.

In case of the bankruptcy or insolvency of the assignee, the trust estate passes to his assignee, subject to the trust.

Dexter v. Stewart, 7 Johns. Ch. 52.

Equity always compels the trustee to surrender the legal estate to the *cestui que trust*, unless the receipt of the profits by the trustee is requisite to effectuate the intention of the creator of the trust.

Jasper v. Maxwell, Dev. Eq. 357.

The law never compels a trustee, who sells under his trust, to enter into any covenants in his deed, except a covenant against his own encumbrances.

Ennis v. Leach, 1 Ired. Eq. R. 416.ℊ

(I) Trustee in what Cases favoured, and in what Cases decreed to account, β and of their Liability.ℊ

It is a rule that the *cestui que trust* ought to save the trustee harmless, as to all damages relating to the trust; and it is within the reason of that rule, that where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the *cestui que trust* is discharged from being liable for a greater sum lent, or from a plain and great hazard of being so, that the trustee ought to be paid.

2 P. Wms. 455, Balsh v. Hyham. ‖Though there is no indemnity-clause the court infuses such a clause into every will. 18 Ves. 254.‖

β Where the trustee of a settlement, empowered to lend the trust moneys to the husband, on the security of his bond alone, lent it on his note, and without the requisite consent in writing, and upon the death of the remaining trustee then remaining unpaid, his executors and devisees filed a bill against the husband for the restoration of the trust funds, the appointment of new trustees, and to correct existing irregularities as to the trust estate; held, that the plaintiffs had a clear right, notwithstanding the liability of their testator's estate, to file the bill, and upon the funds being restored, to have some one to whom they might safely convey the legal estate, and be relieved from further responsibility: held, also, that when a trustee finds the trust estate involved in intricate and complicated questions, which could not have been contemplated at the time of undertaking the trust, he has a right to come to the court to be relieved, and will be favourably considered.

Greenwood v. Wakeford, 1 Beav. 576.ℊ

[And if a trustee errs in the management of the trust, and is guilty of a breach of trust, yet, if he goes out of the trust with the approbation of the *cestui que trust*, the breach of trust ought rather to fall upon the estate of *cestui que trust;* for the courts are ever anxious to deliver the trustee from any misapplication of the trust money.

Trafford v. Boehm, 3 Atk. 444; ‖ 4 Russell, 272.‖ ȣ Where a trustee acts to the best of his judgment, he will be protected, although he may have made some trifling mistakes. Root v. Yeomans, 15 Pick. 488. See 9 Pick. 446; 18 Pick. 181; 20 Pick. 456.ℊ

But it is an established rule, that a trustee, executor, or administrator, shall have no allowance for his care and trouble: the reason of which seems to be, that on these pretences, if allowed, the trust-estate might be loaded and rendered of little value. Besides, the great difficulty there might be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another,

and there can be no hardship in this case upon any trustee, who may choose whether he will accept the trust or not.

Robinson v. Pett, 3 P. Wms. 251. See Harwood v. Harrison, Mos. 128.] {See 4 Ves. J. 596, Hovey v. Blakeman. An executor in India, passing his accounts in Chancery in England, is entitled to the commission upon the receipts or payments, according to the practice in India. 4 Ves. J. 72, Cheltham v. Lord Andley.} ‖Chambers v. Goldwin, 5 Ves. 834; 9 Ves. 254. In re Ormsby, 1 Ball. & Bea. 189; *sed* vide Ellison v. Airey, 1 Ves. 115; Brown v. Litton, 1 P. Wms. 140.‖ β As to the allowance of compensation to trustee, see *post* (O.)β

‖But though a trustee be not allowed for his trouble, it seems that if he employ a bailiff to manage the trust estate, he must be allowed for the employment of and payments made to such bailiff.

Bonithorn v. Hockmore, 1 Vern. 316; Wilkinson v. Wilkinson, 2 Sim. & Stu. 237.

And a trustee is entitled to his costs, unless he acts with obstinacy and caprice.

Forrest v. Elwes, 2 Meriv. 68; Taylor v. Glanville, 3 Madd. 178; O'Callaghan v. Cooper, 5 Ves. 117; *post*, 249.‖

[An executor in trust who had no legacy, and where the execution of the trust was likely to be attended with trouble, at first refused, but afterwards agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship, and he dying before the execution of the trust was completed, his executors brought a bill to be allowed these 100 guineas out of the trust-money in their hands, insisting that the residuary legatees might as well make a contract with the executor, touching the overplus, (which was their own property,) as the testator himself; and that no harm could happen thereby to the trust-estate. But the court said, all bargains of this kind ought to be discouraged, as tending to eat up the trust; and here the executor had died before he had finished the affairs of the trust: wherefore the plaintiff's demand was disallowed.

Gould v. Fleetwood, Mos. 128. In Ayliffe v. Murray, 2 Atk. 60, Ld. Hardwicke is reported to say, "If a trustee comes in a fair and open manner, and tells the *cestui que trust* that he will not act in such a troublesome and burdensome office, unless the *cestui que trust* will give him a further compensation over and above the terms of the trust, and it is contracted for between them, I will not say this court will set it aside, though there is no instance where they have confirmed such a bargain."

It seems to be owing to this jealousy, which a court of equity entertains of an executor or trustee, that if *they* compound debts or mortgages, and buy them in for less than is due thereon, they shall not take the benefit of it themselves, but other creditors and legatees shall have the advantage of it, and for want of them, the benefit shall go to the party who is entitled to the surplus; whereas, if one who acts for himself, and is not in the circumstances of an executor or trustee, buys in a mortgage for less than is due, or for less than it is worth, *he* shall be allowed all that is due thereon. Thus in the case of Baldwyn v. Banister, heard at the Rolls, Pasche, 1718. The case was, a mortgagor in fee died, and the mortgagee brought in the mortgagor's wife's right of dower. Decreed, that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after the money paid. So, in the case of Powell v. Glover, Mich. 1721, at the Rolls, where a guardian compounded debts, decreed, that it should be for the benefit of the infant.

Gould v. Fleetwood, Mos. 128; {6 Ves. J. 625, Ex parte Lacey; 8 Ves. J. 337, Ex parte James.} 1 Salk. 155; 1 Vern. 476; 2 Atk. 54. ‖See Phayre v. Perce. 3 Dow. P. C. 116; Fox v. Mackreth, 2 Bro. C. C. 400; 2 Cox, 320.‖

(I) Trustee where favoured, and where to account.

So, it hath been holden upon the same principle, that a trustee shall not be allowed to become the purchaser of that which he holds in trust. It is said, indeed, in one case,(*a*) that if the title be *re vera* in a third person, the trustee may purchase as well as any one else.

Whelpdale v. Cookson, 1 Ves. 9; Killick v. Flexney, 4 Bro. Chan. R. 161. βSee Williamson v. Seaber, 3 Younge & C. 717; Wilkins v. Stevens, 1 Younge & C. 431.ϑ ‖See Witchcote v. Laurence, 3 Ves. 740. Campbell v. Walker, 5 Ves. 678; Ex parte Reynolds, Ibid. 707; Ex parte Hughes, 6 Ves. 617; Ex parte Lacey, Ibid. 625; Lister v. Lister, Ibid. 631; Ex parte James, 8 Ves. 337; Coles v. Trecothick, 7 Ves. 234; Ex parte Morgan, 12 Ves. 6. Where a security is made by way of mortgage with a power of sale, the donee of the power is a trustee within the rule. Downes v. Grazebrook, 3 Meriv. 200. In Montesquieu v. Sandys, 18 Ves. 313, Lord Eldon observes, there is no authority establishing that an attorney cannot purchase from his client what was not, in any degree, the object of his concern as attorney. See also Woods v. Downes, 18 Ves. 120; Hooper v. Goodwin, Cooper, 95; and note (a), 3 Meriv. 209. In Sanderson v. Walker, 13 Ves. 601, Lord Eldon also observed, "The principle has often been laid down that a trustee for sale may be the purchaser, in this sense, that he may contract with his *cestui que trust* that with reference to the contract of purchase they shall no longer stand in the relative situation of trustee and *cestui que trust;* and that the trustee having, through the medium of that sort of bargain, evidently, distinctly, and honestly proved that he had removed himself from the character of trustee, his purchase may be sustained." And see 11 Ves. 226, Gregory v. Gregory, Coop. 201; Attorney-General v. Lord Dudley, Coop. 146; Randall v. Errington, 10 Ves. 423; Chalmers v. Bradley, 1 Jac. & W. 51; Naylor v. Winch, 1 Sim. & Stu. 555.‖ (*a*) Leslie's case, 2 Freem. 52;] ‖Oherlihy v. Hodges, 1 Scho. & Lef. 123, *acc.*‖

A trustee shall not be charged with imaginary values, but only as bailiff, though very supine negligence might, indeed, in some cases, charge a trustee with more than he had received; but the proof thereof must be very strong; and it is a hardship on him, that he is allowed nothing for his pains. *It has been said likewise, that it was a hard rule to charge a trustee with what he had made, or might have made, without his wilful default: but the reason was, because the court could never yet find where else to fix the measure.*

1 Vern. 144, Palmer v. Jones. {He shall be charged with a loss occasioned by his negligence, or want of caution, though he act innocently. See 5 Ves. J. 141, Vez v. Emery; 6 Ves. J. 488, Caffrey v. Darby; 9 Ves. J. 103, French v. Hobson.}

The defendant was trustee to the plaintiff, an infant, and received for him 40*l.* in gold; the trustee was robbed by his own servant, who lived with him in the house, of 200*l.*, together with this 40*l.*, which last sum was only proved by the defendant's own oath; yet my Lord Chancellor allowed it on account, for he was but to keep it as his own.

2 Chan. Ca. 2, Morley v. Morley; {1 Cain. Er. 96, Furman v. Coe. So, if the property is carried off by an enemy, the trustee is excused. 1 Bay. 328.}

If a trustee, sued for the trust estate, obtains a decree with costs of course, and the costs taxed him are short of his real costs; and the *cestui que trust* exhibits a bill for an account of the trust estate; the trustee, in his disbursements, shall be allowed the full and necessary costs, and shall not be concluded by the costs taxed.

2 Chan. Ca. 138, Amand v. Bradburne; {10 Ves. J. 184, Fearnes v. Young.} [If a trustee has not misbehaved himself, it is the rule to allow him his costs. Perrott v. Treby, Pr. Ch. 254; 1 Eq. Ca. Abr. 125, pl. 4, S. C.; ‖Taylor v. Glanville, 3 Mad. 178.‖ *Secus*, if he has misbehaved himself. Dawson v. Parrott, 3 Bro. Ch. R. 236; Ball v. Montgomery, 2 Ves. J. 191; Horsley v. Challoner, 2 Ves. 83.] ‖If a trustee refuse to pay a legacy without the court's direction in a case admitting of no doubt, he will be refused costs. Knight v. Martin, 1 Russ. & Mylne, 70. And a trustee will not be allowed the amount of costs paid to his solicitor without question. The master will not moderate amount. Johnson v. Telford, 3 Russell, 477. And trustees of a charity (though not in fault) cannot be allowed the costs of an unsuccessful attempt to obtain an act for administering the property. Attorney-General v. Mansfield, 2 Russell, 50; and see Ibid. 93.‖

(I) Trustee where favoured, and where to account.

If two estates are conveyed to a trustee for payment of several and distinct debts, and the heir at law brings a bill for an account, and afterwards prays that the bill may be dismissed as to one of the estates, yet an account shall be taken of both estates.

1 Vern. 28, Purefoy v. Purefoy.

A devised 100*l.* a-piece to four children, payable at twenty-one, or marriage, with maintenance not exceeding the interest in the mean time: B was appointed trustee of a trust-estate, to raise and pay the legacies as aforesaid; and he paid 20*l.* in placing out one of the children apprentice, who died before his age of twenty-one years: the court held, that that 20*l.* was well laid out, and that the trustee should be allowed it: though the 100*l.* was limited over, in case of death before twenty-one, or marriage.

2 Vern. 137, Franklin v. Green.

But, if a trustee for the payment of children's portions pay one of them his full share, and the trust-estate decay, he shall not be allowed such payment. It was urged, in this case, that though the appointment was to pay the eldest in the first place, &c., yet it would not be good, as it did not denote preference in the quantity of the sum to be paid: but my Lord Keeper was of another opinion as to this point. It seems clearly agreed, however, that a specific legatee may be paid in the first place.

2 Chan. Cas. 132, Tilsley v. Throckmorton.

{An executor neglecting to call in or bring an action for a bond debt will be charged with the amount.

2 Bro. C. C. 156, Lowson v. Copeland; 5 Ves. J. 839, Powell v. Evans. See 1 Bay. 304, Legatees of Ash v. Exr. of Ash.}

If one devise to trustees, and by an express clause give them power to appoint agents to manage the land, and they appoint one then solvent and good, though after he prove insolvent, they shall not answer for him; but it is otherwise, if he were not solvent at the time of nomination. But, if there were no such direction or power in the will, the trustees are bound to answer for their agents at all events. *Per* Lord Keeper Wright.

12 Mod. 560, Sutton the Marshal's case.

{If an executor deposits money in the hands of his testator's banker, who is solvent at the time, but afterwards becomes insolvent, the executor shall not be charged with the loss.

3 Ves. J. 565, Rowth v. Howell; 1 Dick. 120, Knight v. Earl of Plymouth. And see 5 Ves. J. 331, Bacon v. Bacon; 7 Ves. J. 193; 6 Ves. J. 226, Adams v. Claxton; 11 Ves. J. 377, Wren v. Kirton.}

If a trustee empowered to put money to interest let the money lie by him, he shall be accountable for interest. *Per* Harcourt, Lord Keeper.

Brown v. Litton, 10 Mod. 21. ‖See Young v. Combe, 4 Ves. 101; Byrchall v. Bradford, 6 Madd. 13.‖ [Bird v. Lockey, 2 Vern. 744; Perkins v. Bayntum, 1 Bro. Ch. R. 375; Franklin v. Firth, 3 Bro. Ch. R. 433, S. P. A trustee neglecting to pay money into court after an order for that purpose, shall be charged with interest, but a slight difference between the sums remaining in his hands, and those reported due by the Master, is not a sufficient reason for the court to order him to pay interest. Sammes v. Rickman, 2 Ves. Jun. 36.] {He shall pay interest where he has been guilty of neglect in not putting out money, or where he has made use of it himself. 4 Ves. J. 101, Younge v. Combe; Ibid. 620, Piety v. Stace; 7 Ves. J. 124, Longmore v. Broom; 8 Ves. J. 48, Lord Chedworth v. Edwards; 11 Ves. J. 58, Rooke v. Hart; Ibid. 92, Raphael v. Bœhm; Ibid. 581, Mosley v. Ward; 12 Ves. J. 386, Bruere v. Pemberton; 1 Binn. 194, Fox v. Wilcocks; 2 Binn. 300, Guier v. Kelly; 1 Wash. 246, Granberry's Exr. v. Granberry.}

(I) Trustee where favoured, and where to account.

Likewise, although an executor or trustee is not empowered or directed to place out money at interest, yet, if he makes interest, he shall be accountable for it. Decreed accordingly.

2 Vern. 548, Lee v. Lee; [1 Bro. Ch. R. 375, Perkins v. Bayntum; Ibid. 384, Trevis v. Townshend; Ibid. 359, Newton v. Bennett; 1 Vern. 196, Radcliffe v. Graves, S. P.; {3 Bro. C. C. 73, Littlehales v. Gascoyne.} And if a trustee appear to have employed the trust-money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of those profits. Brown v. Litton, 10 Mod. 21; Forbes v. Ross, 2 Bro. Ch. R. 430.] ‖It is in the option of *cestui que trust* to take the interest or the profits, and they must elect. Heathcote v. Hulme, 1 Jac. & Walk. 122;‖ β Docket v. Somes, 2 Mylne & K. 655, *acc.*ℊ

But afterwards, a difference was taken by Lord Macclesfield, viz., that if an executor or trustee of money places it out in the funds, or on other security, whereby he gains considerably, he shall have the whole benefit thereof to himself, in respect of the hazard he runs of being a considerable loser thereby, which he must have borne; but, if such trustee or executor were an insolvent person at the time of placing out such trust-money, there the *cestui que trust* shall have the whole benefit gained thereby; as he only could have borne the loss thereof, if any had happened; the trustee or executor, by reason of his insolvency, being incapable thereof, and consequently running no hazard at all.

1 Abr. Eq. Ca. 398, Bromfield v. Wytherly. [The doctrine here advanced, though sanctioned by great opinions in subsequent cases, Adams v. Gale, 2 Atk. 106; Child v. Gibson, Ibid. 613, is not to be considered as law. Newton v. Bennett, 1 Bro. Ch. R. 359; Horsley v. Challoner, 2 Ves. 85.]

If a trustee is directed to place out money on the best security that can be got, with the consent of husband and wife; and he puts it into a banker's hand, and take his note for it, and he becomes a bankrupt, by which the loss happens; the trustee shall be decreed to pay the money out of his own pocket, though no fraud appear, and though the consent of husband and wife be had to it.

Rider v. Bickerston, MS. Rep. ‖3 Swanst. 80, *notâ*, S. C.‖ [Vide Ambl. 219, *contrà*.] β See Greenwood v. Wakeford, 1 Beav. 576.ℊ

βWhere, instead of following the direction to invest the fund in consols, and accumulate the dividends, the trustees invested it in mortgage, held liable to make the fund good to the extent it would have reached, if the direction had been complied with.

Pride v. Fooks, 2 Beav. 430.ℊ

‖Where a receiver having received a large sum for rents did not think it safe to remit the money to London, and therefore paid it to a considerable tradesman, and took bills on London for the amount; the tradesman soon after becoming bankrupt, the receiver was held not to be accountable for the money, the tradesman having been in good credit at the time.

Knight v. Ld. Plymouth, 3 Atk. 480; and see Rowth v. Howell, 3 Ves. 565; Adams v. Claxton, 6 Ves. 226.

But where the receiver took a bill for a debt due to the estate, and remitted it to his own bankers on his general account, he was held liable to the loss on the failure of the bankers, the Lord Chancellor distinguishing this from the case of Knight v. Plymouth, since that was a single transaction, but this was mixed, and he would not allow a receiver so to deal, that if the solvency of the banker continued, the property was his own, but if insolvency happened, part of the account was to be of the trust estate.‖

Wren v. Kirton, 11 Ves. 382; and see Rocke v. Hart, 11 Ves. 60; Massey v. Ban-

ner, 4 Madd. 413; 1 Jac. & Walk. 241; Robinson v. Ward, 1 Ryan & Moody, N. P. Ca. 274, *acc.*‖

[It hath been holden, that if an executor invests money in the funds, he shall not be liable to the fall of stocks; because the court, if applied to, would have made the same appropriation.

Ex parte Champion, cited in Hutcheson v. Hammond, 3 Bro. Ch. R. 147.

Where a trustee sells out stock contrary to the trust, the *cestui que trust* may elect to have the stock restored, or the produce of it paid. But if a trustee for the benefit of the trust-estate sells out of one fund, and invests the produce in another, or transfers the money from one real security to another, the property continues unaltered, and he shall not be chargeable.

Harrison v. Harrison, 2 Atk. 121; Bostock v. Blakeney, 1 Bro. Ch. R. 1656; Waite v. Whorwood, 2 Atk. 159; Worsley v. Earl of Scarborough, 3 Atk. 392;] {4 Ves. J. 622, Piety v. Stace; 12 Ves. J. 402, Bate v. Scales;} ‖Pocock v. Reddington, 5 Ves. J. 794; Long v. Stewart, 5 Ves. 800; Widdowson v. Duck, 2 Meriv. 494; Powlett v. Herbert, 1 Ves. 297.‖

{A trustee is entitled to interest {1} upon advances {2} made for the use of *cestui que trust*, to supply the deficiency of the trust fund. He is also entitled to allowance for depreciated paper money {3} paid to him for rent of the trust estate, and for expenses incurred in erecting proper and necessary buildings upon it, although the *cestui que trust* was not consulted.

1 Binn. 488, Lessee of Dilworth v. Sinderling. Vide 7 Ves. J. 480, Webb v. Earl of Shaftesbury. {1} 1 Binn. 135, Cecil's Lessee v. Korbman. {2} And he has a *lien* on the trust-estate for them. 1 Binn. 126, Frazer's Lessee v. Hallowell, and Cecil's Lessee v. Korbman, there cited. {3} 1 Wash. 226, Sallee v. Yates.}

‖ Where trustees represented that the fund was invested in stock, they were held to be chargeable with 5 *per cent.* interest, on the same principle as if they had sold the stock and used the money, since it was the established option of the *cestui que trust* to have the actual profit made, or 5 *per cent.* interest.

Bate v. Scales, 12 Ves. 402; and see 10 Ves. 470; 6 Madd. 235.

But while the original stock remains vested in their names, or if they purchase any other stock, in pursuance of a power reserved to them, trustees will not be answerable for the falling of such original stock in the one instance, nor of the new fund in the other.

Jackson v. Jackson, 1 Atk. 513. The discretionary power of trustees to vary securities is not controlled by the Court of Chancery, unless ruinously exercised. De Mannerville v. Crompton, 1 Ves. & B. 354.

On the marriage of Lord Montfort, a settlement was made of a renewable lease, in trust out of the rents to pay the renewal fines and charges, and subject thereto for the husband and wife successively for life, with remainder for the first son at twenty-one. The trustees having neglected to renew, they were held answerable as for a breach of trust, and liable to pay to the son what he had laid out in procuring a renewal, but to be repaid out of the estates of the tenant for life, with reference not to the duration of their possession respectively, but to the proportions in which they would actually have suffered a diminution of rent, in case the rents had been properly applied towards the renewals.

Montfort v. Cadogan, 17 Ves. 485; 2 Meriv. 3.

Trustees and their representatives are liable in equity for a breach of trust, although they derive no benefit from it, and although it happen without any corrupt motive.

Adair v. Shaw, 1 Scho. & Lef. 272; Scurfield v. Howes, 3 Bro. C. C. 91; Caffrey

v. Darby, 6 Ves. 488; Wilkinson v. Parry, 4 Russell, 272. As to the mode in which trustees must make up their accounts, see Montgomery v. Wauchope, 4 Dow. Parl. Ca. 109.‖

β A trustee purchasing the trust-estate at an undervalue, decreed to be the purchaser and account at the present improved value, he being allowed for permanent improvements.

Williamson v. Seaber, 3 Younge & C. 717. See Richardson v. Jones, 3 Gill. & Johns. 163; Davis v. Simpson, 5 Harr. & Johns. 147; Dorsey v. Dorsey's heirs, 3 Harr. & Johns. 410; Haddix v. Haddix, 5 Litt. 202; Brackenridge v. Holland, 2 Blackf. 377; 2 Johns. Ch. 256; 3 Paige, 178; 1 Paige, 393.

Where, after a lapse of twenty years, it was alleged that an estate had been purchased by an administratrix with the intestate's estate, the court, upon evidence of loose conversations only, refused to consider the purchase as a trust.

Wilkins v. Stevens, 1 Younge & C. 431.

A trust-estate is liable for necessaries furnished on its account, though purchased by a general agent of the estate.

Montgomery v. Eveleigh, 1 M'Cord's Ch. R. 267; Cater v. Eveleigh, 4 Desaus. 19; Maywood v. Johnston, 1 Hill's Ch. 230; James v. Mayrant, 4 Desaus. 591. See Markan v. Guerrant, 4 Leigh, 279.

Where trustees have accepted of the trust and entered upon its execution, they cannot afterwards, without the consent of the *cestui que trust*, or the direction of the court, surrender or discharge themselves of the trust. Thus a debtor having assigned property for the benefit of his creditors, and A B, one of the *cestuis que trust*, being in England at the time was not apprized of it, and the trustees subsequently assigned the trust-estate to other trustees, upon other trusts, which would have deprived A B of his rights. Held that the second trustees, knowing the nature of the first assignment, were chargeable with the trusts contained in it.

Shepherd v. M'Evers, 4 Johns. Ch. 136.

It is the duty of trustees to keep the trust-funds separate and distinct from their private funds. If they use the trust funds, or use them with their own, they will be liable for all losses which may arise by their neglect or mismanagement.

Case v. Abeel, 1 Paige, 393; Myers v. Myers, 2 M'Cord, Ch. 265; Brackenridge v. Holland, 2 Blackf. 377.

A trustee who improperly suffers the funds to pass into the hands of his co-trustee, is responsible in case of loss.

Mumford v. Murray, 6 Johns. Ch. 16, 452. See Monnell v. Monnell, 5 Johns. Ch. 296.

Where trustees are authorized to invest in stock or in real security, and they lend on personal security, they are liable for the principal money only, and not for the value of the stock they might have purchased.

Marsh v. Hunter, 6 Mad. 295.

The expense of putting into tenantable repair an estate purchased by a trustee, is a charge on the principal fund; that of keeping it in repair is chargeable to the income.

Parsons v. Winslow, 16 Mass. 361.

It is a rule well settled in the English Chancery, adopted in New Jersey, that if trustees loan money without due security, they are liable in case of insolvency.

Gray v. Fox, Sax. Ch. R. 259.

(I) Trustee where favoured, and where to account.

Trustees are not allowed to retain to themselves profits made upon the use of the property of the *cestui que trust.*

Peyton v. Smith, 2 Dev. & Bat. Eq. 339; Voorhees v. Stoothoff, 6 Halst. 145; Trenton Banking Company v. Woodruff, 1 Green's Ch. R. 117.

When a trustee lends the money of the *cestui que trust* without due security, he is responsible when the borrower becomes insolvent.

Smith v. Smith, 4 Johns. Ch. 281.

When the creator of a trust prescribes no rule for the management of the trust estate, the law enjoins good faith; that is, honesty and diligence properly applied; and a departure from the rule prescribed, or a failure of good faith, will render the trustee liable.

Hester v. Hester, Dev. Eq. 328.

When trustees are empowered to sell real estate, and with the proceeds pay debts and make investments in stock, they are not authorized to exchange the trust property for other real estate; by making such exchange, though with the best intentions, they become responsible for the value of the property parted with.

Ringgold v. Ringgold, 1 Harr. & Gill. 11.

A trustee is not chargeable with imaginary values, or more than he has received, unless there be evidence of gross negligence, amounting to a wilful default.

Osgood v. Franklin, 2 Johns. Ch. 1; S. C. 14 Johns. 527.

When a trustee mismanages or puts the trust fund in jeopardy, by his insolvency, either existing or impending, he will be restrained from further interfering with the estate, and compelled to deliver up the funds.

Elmendorf v. Lansing, 4 Johns. Ch. 565.

A father, who is trustee for his child, will not be allowed for the maintenance of such child, except when the father is in indigent circumstances. Expenses of education allowed being charged on the child's estate.

Myers v. Myers, 2 M'Cord, Ch. 264.

A trustee in the possession of land is required to account to the *cestui que trust*, not only for the rents and profits actually received, but such as might have been received.

Rogers v. Rogers, 1 Paige, 188.

When a trustee has made *bonâ fide* advances for the trust estate, he has a right to be refunded out of the trust estate.

Watts v. Watts, 2 M'Cord, Ch. 82; Murray v. De Rottenham, 6 Johns. Ch. 62.

A trustee cannot act for his own benefit in a contract on the subject of the trust, as to purchase a debt at a discount.

Green v. Winter, 1 Johns. Ch. 27; Parkist v. Alexander, 1 Johns. Ch. 394; Holdridge v. Gillespie, 2 Johns. Ch. 30; Hart v. Ten Eyck, 4 Johns. 104; Davoue v. Fanning, 2 Johns. Ch. 256; Kellogg v. Wood, 4 Paige, 578; M'Clanahans v. Henderson, 2 A. K. Marsh. 389.

For any fraudulent act committed by him, the trustee is answerable to the *cestui que trust.*

Cobb v. Thompson, 1 A. K. Marsh. 513.

A trustee is not allowed to keep the income of the estate, to be accounted at the termination of the trust, and, in the mean time, to appropriate the capital to the payment of the annual expenses of the trust; the income should, in the first place, be applied to the support of the *cestui que trust*,

(K) How far Trustees are answerable for each other.

if an infant, and to answer to the other exigencies of the trust, before the principal, before any encroachment upon the principal.

De Peyster v. Clarkson, 2 Wend. 77.

(K) How far Trustees are answerable for each other.

EACH trustee shall be charged for no more than what he actually received: but, where they join in receipts, there they shall be all charged: *Per* North, K.

Spalding v. Chalmer, 1 Vern. 301; Bridgm. 37, Townley v. Sherborn, S. P. A and B, trustees, received 1000*l.* each on sale of a trust-estate, and both joined in receipt for the money, as they did in the sale and the conveyances; B became insolvent. Wright, K., doubted if A should answer the whole. 2 Vern. 504, pl. 453, Fellows v. Owen; 1 P. Wms. 81, pl. 83, S. C. And it is there said that the *cestui que trust* was present, and consenting to the payment as above; and at his importunity the trustees joined in acquittance for the whole. Decreed that A should not answer for B's 1000*l.*

{If two trustees for the sale of an estate join in the conveyance, and that conveyance includes a receipt for the consideration money, one trustee is not answerable for the money which goes into the hands of the other, and is by him misapplied. Their joining in the conveyance and receipt was necessary.

4 Johns. Rep. 23, Kip's Adm'rs v. Deniston.}

But, if two executors join in the sale of the goods, &c., of the testator, they shall be both chargeable, though one of them only received the money, for there was no necessity for their joining.

2 Vern. 570, Murrel v. Cox; 1 Salk. 318, Churchill v. Hopson, S. P. [The distinction between executors and trustees as to this point appears also in Applyn v. Brewer, Pr. Ch. 173; Attorney-General v. Randall, 21 Vin. Abr. 534, pl. 9, *et infra.* Ex parte Belchier, Ambl. 219; Leigh v. Barry, 3 Atk. 584; Read v. Truelove, Ambl. 417. And notwithstanding the inclination expressed by Lord Harcourt in Churchill v. Lady Hobson, 1 P. Wms. 241, and 1 Salk. 318, and by Lord Northington in Westley v. Clarke, 1 Cox's P. Wms. 82, to favour executors equally with trustees, yet the distinction still prevails; and where by *any act done* by one *executor*, any part of the estate comes to the hands of another executor, the former will be liable for his companion in the same manner as if he had enabled a stranger to receive it. Sadler v. Hobbs, 2 Bro. Ch. R. 117; Scarfield v. Howes, 3 Bro. Ch. R. 90; ‖ Brice v. Stokes, 11 Ves. 319; Bradwell v. Catchpole, 3 Swanst. 78, *nota;* Walker v. Symonds, 3 Swanst. 2. ‖ In Westley v. Clarke, one of the executors had actually received the money without the concurrence of his co-executors, and they signed the receipt afterwards; so that, as Lord Thurlow observed, in commenting upon that case, there was no act done by the co-executors which put it into the power of the executor who received the money to get at it, since, in fact, he had it at the time; for Lord Northington said, that he should have thought the co-executors *liable*, if they had been present at the time when the money was paid. See Cox's P. Wms. 241, note; ‖ 1 Eden, 357, S. C.‖ In Churchill v. Lady Hobson, *ubi supra*, where Lord Harcourt held, that where two executors joined in the receipt, and one only actually received the money, the latter only should be chargeable to legatees, though it would be otherwise as to creditors (a distinction, by the way, not to be found in the decree, nor adopted in latter cases, Sadler v. Hobbs, 2 Bro. Ch. R. 117, though to be met with in an earlier case, Gibbs v. Herring, Pr. Ch. 49;) it appeared that the executor who received the money had been the testator's banker, and that circumstance has been considered as having had some weight in the determination.] ‖ Where executors and trustees negligently joined in a transfer of stock to a co-executor on a false representation that it was necessary to pay debts, they were held liable for the amount, except so much as had actually been applied to pay debts. Shipbrook v. Hinchinbrook, 16 Ves. 477.‖

J S, by will, 1724, gave 650*l.* to R and two other trustees *in trust* to build and endow an alms-house in Cornwall for maintenance of five poor women, and made M and N executors, and appointed the 600*l.* to be paid

within six months after his death, with interest. R lived in London, and the other trustees in Cornwall. R called on the executors for the money, who refused to pay it, unless the two other trustees would join in a receipt. R procured a receipt, and received all the money, and paid at times, by directions of the other trustees, for building, &c., 400*l.*; and about four years after the money first received, failed, and was then insolvent. On a bill for an account against all the three trustees, Lord Chancellor decreed R only to be chargeable.

2 Abr. Eq. Ca. 742, Lord Chancellor said, that it could not be expected that all the trustees should meet together to receive the money; but, if they had, either one must have had the custody of the whole, or it must be divided into shares. Suppose all the money had been lodged in a banker's hands *bonâ fide*, and he had failed, should the trustees have been answerable? &c. And if they intrust one of themselves for *convenience* or *necessity*, at a time when he is solvent, which is no more than making him their banker, shall equity punish where there is no default? and this is the very case of Churchill v. Hopson; and to charge trustees in such a case would make the case of the trustees, who are necessary for the common good and convenience of families, &c., very perilous; and his lordship said, he saw no reason why trustees may not make one of themselves their cashier, where there is no fraud. That this was a reasonable thing, R at that time being the only trustee who lived in London, where the money was paid, &c. And as to an objection made as to letting the money lie so long in R's hands, he said the case of R differs from the case of a common banker, where the money may be drawn out at pleasure; but here R had as good a right to the keeping of it as the others, and all was paid out to about one-third, and he was intrusted by the testatrix as much as the other. Ibid.——If *one trustee directs the payment of the trust-money over to the others* and *joins in the deed*, he charges and makes himself liable for the default of the other. Said to have been so lately held in Chancery in the case of Serjeant Webb's will. Ibid.——[For where, by any act or agreement of a trustee, money gets into the hands of his companion, they shall both be chargeable. Sadler v. Hobbs, 2 Bro. Ch. R. 116; Keble v. Thompson, 3 Bro. Ch. R. 110. So, if a trustee know of the embezzlement of the trust-fund by his companion, he shall be charged with the amount. Boardman v. Mosman, 1 Bro. Ch. R. 68.] {So, if he joins in a sale which is unnecessary, and in the receipt, and permits his co-trustee to keep and act with the money contrary to the trust, he shall be charged, though he receive nothing; 11 Ves. J. 319, Brice v. Stokes: unless the *cestui que trust* had notice of the breach of trust and acquiesced. Ibid. and 333, Langford v. Gascoyne.} ‖Brice v. Stokes, 11 Ves. 319; but not in respect of the interest of a *cestui que trust*, who had notice of the breach of trust, and acquiesced. Ibid. Adams v. Clifton, 1 Russ. 297.‖

But if, upon the proofs of circumstances, the court be satisfied that there be *dolus malus*, or any evil practice, fraud, or ill-intent in him that permitted his *companion to receive the whole profits*, he may be charged though he received nothing.

Bridgm. 38, Townly v. Sherborne.

β A trustee, by proving a will, undertakes the trust, and if he stands by inactive, and sees his co-trustee commit breaches of trust, he will be liable should any loss be incurred; but if the *cestui que trust* concur, the fund to which he may be entitled will be liable to compensate him.

Booth v. Booth, 1 Beav. 125.*g*

If there are two trustees, and one of them, without warrant of the party that trusts him, or of a court of equity, assigneth his estate, and the assignee receives the profits, and becomes insolvent, he that made the assignment shall answer it for him; but the other original trustee shall answer for no more than what he receiveth, because the assignee cometh not in by him, or by his assent or appointment; and in case such original trustee, who did not make the assignment, receive the whole profits and become insolvent, neither the assignor or assignee shall be answerable for them.

Bridgm. 38, Townley v. Sherborne; Cro. Car. 312, S. C. The trustees both sealed

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the counterpart of the assignment, and joined in acquittances for rent for a year and a half; but one of them never meddled further. Resolved by Lord Keeper, assisted by four judges, whereof Croke, J., was one, that the other, being only a party intrusted, shall not be answerable for more than came to his hands; for it was the default of him who put them in trust, to repose trust in one who was not able to pay; and he being trusted as well as the other, the other shall not be compellable to make good his defect; and so reversed a decree, whereby the other trustee was made liable to pay.—S. C. cited 2 Vern. 516, and it is there said, that the making joint trustees by the joining in receipts to be answerable for each other (as in the above case) seemed to be against natural justice, unless they had so joined in receipt as not to be distinguished what had been received by one, and what by the other; that there, indeed, of necessity, they must both be charged with the whole; and that is from their own neglect or default; as, if another man should blend his money with mine, by rendering my property uncertain he loses his own; and that there was a difference between joint trustees and executors; executors may act separately if they think fit, but if a trust-estate is to be sold, the trustees must join in conveying, and also in receipts; otherwise no one will purchase. And since one trustee has equal power, authority, and interest with the other, the one cannot in reason insist, or desire to receive more of the consideration-money than the other, or to be more trustee than his partner or co-trustee. ‖See Bires v. Betty, 6 Madd. 90.‖

‖If a settlement direct that a trustee on retiring shall assign the trust property to the continuing trustee and to a new trustee to be appointed in his place, the retiring trustee will be answerable for a misapplication by the continuing trustee, if he assign to him alone.

Wilkinson v. Parry, 4 Russell, 272.‖

β Trustees are chargeable with loss to the estate and interest, occasioned by their voluntarily permitting a co-trustee to receive purchase-money, and retain it a considerable time before calling for security contrary to the trust; notwithstanding a provision in the will that the trustees should not be answerable for any moneys, further than each person for what he should respectively receive.

Bone v. Cook, McClel. 168.

A trustee, who stands by and sees a breach of trust committed by his co-trustees, becomes responsible for that breach of trust.

Booth v. Booth, 1 Beav. 125.

A and B were appointed by will trustees for a female infant. In the first place A accepted the trust with an understanding that he would not interfere further than to give his associate his advice. B received the rents for several years, and was indebted to the estate when he became embarrassed in his affairs; he then deposited in the hands of A certain promissory notes and acceptances, for which A gave a receipt as deposit for money belonging to their ward. The friends of the infant becoming alarmed, applied to A, who told them that B had put into his hands notes sufficient to cover the trust-funds which he, B, had received, and that they might make themselves easy on that score, which induced them to rest satisfied. Afterwards A returned the securities to B, who collected the amount due on them, and applied the money, with other funds belonging to the trust, to the purchase of lands in Ohio, and died there insolvent: held, 1st, that A was liable to the *cestui que trust* for the amount of securities he redelivered to B, with interest; 2dly, that the *cestui que trust* was not bound to proceed against the estate of B in Ohio, without the request of A.

Estate of Mary Evans, 2 Ashm. 470.ɣ

(L) In what Cases Trustees shall give Security; and when be discharged or removed.

WHERE a trustee *is insolvent*, the Court of Chancery will compel him to give security before he shall enter upon the trust.

Carth. 458, The King v. Raines.

One trustee was *decreed, at his own request, to release to the other* and his heirs his trust, and that the other should sell the premises devised to be sold.

Fin. R. 380, Travell v. Danvers, Meers and Holbetch.

Likewise, a trustee was removed out of the trust, though much against his will.

2 Chan. Ca. 130, Uvedale v. Ettrick.

|| On motion to dismiss a trustee and release him, inquiry must be made before the Master, whether he remains accountable for any acts done as trustee; and if not, to prepare a release.

——— v. Osborn, 6 Ves. jun. 455; and see 4 Russell, 272.||

β The court removed a trustee, become bankrupt, although he had obtained his certificate, but without prejudice to any interest he might claim under the will appointing him.

Bainbridge v. Blair, 1 Beav. 495.β

(M) The Power βand Rightβ of *Cestui que trust.*

Cestui que trust hath *jus habendi* and *jus disponendi;* and though in law he hath neither *jus in re*, nor *jus ad rem*, yet in equity he hath both.

Mod. 38, Smith v. Wheeler, 1 Rep. 121 b, Chudleigh's case.——So where he is *cestui que trust of a possibility.* Mo. 806, pl. 1093, Cole v. Moore.—But *cestui que trust of a surplus* has but a bare possibility, and *cannot sell.* Chan. Ca. 208. *Arg.* Lord Cornbury v. Middleton.—Unless the trustees are parties. Chan. Ca. 175, Backhouse v. Middleton.—Any disposition by *cestui que trust is binding upon the trustee* in a court of equity, and even at law. Chan. Prec. 415. βThe *cestui que trust* may sell and convey the trust-estate, as well as any other estate. Elliott v. Armstrong, 2 Blackf. 198. But see Waggener v. Waggener, 3 Moor, 545.β

Cestui que trust of a personal estate may *sue in* Chancery to have an account against the executor or administrator; and at the same time in the *Prerogative Court*, to enforce them to bring in an inventory.

3 Chan. R. 72, Digby v. Cornwallis. βSee *post*, (P).β

Likewise, *cestui que trust* may bring *account* against the *bailiff appointed* by his trustee to manage the estate of *cestui que trust*, after such bailiff has accounted to the trustee.

2 Chan. Ca. 121, Pollard v. Downes.

Mortgagor in fee, after the mortgage-money paid, is a *cestui que trust;* and *a will of the lands*, made by such mortgagor, before the mortgage, (notwithstanding such mortgage, and that for want of a re-conveyance the estate in law was in the mortgagee, and so a verdict at law passes against the devisee of such mortgagor,) is good, and not revoked by such mortgage, especially in this case, where there was no republication after the discharge of the mortgage.

2 Chan. R. 297, Hall v. Dench.

It has been held by some, that even a *bargain and sale* enrolled by *cestui que trust of an estate-tail* shall bind the issue, in regard that such a trust is not within the statute *de donis.*

1 Vern. 440, pl. 412, Carpenter v. Carpenter, *alias* Washborne v. Downes. [So, in North v. Champernoon, 2 Chan. Ca. 64, it is said by Lord Chancellor Finch, that

(N) Of Forfeitures by *Cestui que trust.*

tenant in tail of a trust may bar his issue by a feoffment, or bargain and sale. Beverley v. Beverley, 2 Vern. 131; Baker v. Bailey, Ibid. 225. It was determined in Bowater v. Elly, 2 Vern. 344, that *cestui que trust*, if the trustees join, may bar the entail by a feoffment. But in Legatt v. Sewell, 1 P. Wms. 91, and 2 Vern. 552, Lord Cowper intimated a doubt, "whether only a deed, executed by *cestui que trust* in tail, should bar the remainder-man, or even the issue, in regard a deed may be made at a tavern and by surprise; but a recovery is a solemn and deliberate act." And indeed it seems to be now settled, that the issue in tail is not barred without a recovery actually suffered. Weale v. Lowe, (cited) 2 Vern. 306; Kirkham v. Smith, Ambl. 518.] ‖With respect to copyhold lands, where there is no particular custom to bar the entail of the legal estate, it seems that a mere devise by *cestui que trust* is sufficient to bar the entail of the trust. See Otway v. Hudson, 2 Vern. 583, and Mr. Cox's note to Dunn v. Green, 3 P. Wms. 10.‖

But a *common recovery* suffered, or a *fine* levied by *cestui que trust* of an estate-tail, has the same effect in equity as it would have at common law, in case the legal estate was in him. Resolved by Lord Chancellor.

1 Vern. 440, pl. 412, Carpenter v. Carpenter, *alias* Washborne v. Downes. It had been doubted, whether the recovery of *cestui que trust* in tail, with the remainder to another in tail, should bar the remainder, because it was no settled interest vested; and Bridgman, C. J., was of opinion it should not. But it was referred to a case and the judges to consider of it. Chan. Ca. 68, Lord Digby v. Langworth.

A *tender to cestui que trust* of money due on bond, and a refusal, is a good plea to an action of debt on the bond made to trustee.

1 Lutw. 577, Lynch and Templeman v. Clemence. ‖See Huish v. Philips, Cro. Eliz. 755; and *antè*, tit. *Tender* (E), and tit. *Obligations* (D), 3. And so also it has been held, that the obligor in a bond may set off against the obligee a debt due to the obligor from the *cestui que trust* of the bond. Bottomly v. Brook, 1 Term R. 621, 622; but that this doctrine is not to be extended. See Wake v. Tinkler, 16 East, 36; and see 7 East, 153.‖

β Slaves conveyed in trust are subject to execution for the debts of *cestui que trust.*

Jones v. Langhorn, 3 Bibb, 453.

A *cestui que trust* may maintain an action in his own name, after the purposes of the deed creating the trust are satisfied.

Hopkins v. Ward, 6 Munf. 41.

The possession of the trustee is, in equity, the possession of the *cestui que trust.*

Miller v. Bingham, 1 Ired. Eq. R. 423.

Where property, real and personal, was devised in trust, the rents, issues, and profits of which were to be paid to the *cestui que trust*, and a part of the real estate was taken for a road, and the damages recovered for such taking were paid to the trustee. Held, that such damages were not to be considered as income to be paid to the *cestui que trust*, but were a substituted capital, and he was entitled only to the interest arising from it.

Gibson v. Cook, 1 Metc. 75. See 14 Pick. 108; 15 Pick. 471.

The possession of the *cestui que trust* cannot, perhaps, be disturbed by the trustee, but this rule does not apply to trusts raised by construction merely.

Starke's lessee v. Smith, 5 Ohio R. 455.ɡ

(N) Of Forfeitures by *Cestui que trust.*

Cestui que trust for years may *forfeit* his interest for *felony*, but *cestui que trust* in fee cannot. *Per* Hale, C. J.

Hardr. 467, Pawlet v. The Attorney-General.

(O) Compensation to Trustees.

A trust of a *lease in gross* shall be forfeited for felony, as the Earl of Somerset's case in Hob. Daccomb's case, and Cro. J. Babington's case, and Sir W. Raleigh's case: but otherwise of a term assigned over to wait on the inheritance.

3 Chan. R. 36, 37, 5th Resolution, Attorney-General v. Sands.

Cestui que trust of an estate for life levies a fine; it is no forfeiture, but good by the statute of 1 R. 3, c. 1, during his own life; and if proclamations pass, there needs no claim or entry within five years.

Godb. 319, Sheffield v. Radcliff.

But *cestui que trust* in fee or fee-tail *forfeits the same by attainder* of treason, and the estate is to be executed to the king in a court of review by statute 33 H. 8, 27 H. 8, c. 10.

3 Ch. R. 34, Attorney-general v. Sands.

Where an *alien* is *cestui que trust* of an estate, the trust belongs to the king.

3 Ch. R. 35, Attorney-general v. Sands, cites Holland's case.

If *cestui que trust die without heir*, the land shall be discharged of this trust; as, if a tenant in fee of a rent-charge die without heir, or be attainted of felony, the land is discharged.

3 Ch. R. 36, Attorney-general v. Sands.

If *cestui que trust be indebted to the king*, he shall have execution of this trust both by the common law, and the practice of the Court of Exchequer.

3 Ch. R. 35, Attorney-general v. Sands.

A *fine* with proclamation and non-claim will *bar* a trust; and so it was resolved in the Exchequer; and an *entry* on the land by a *cestui que trust* is not sufficient *claim*, but it must be a *subpœna*. *Per* Lord Keeper Finch.

1 Chan. Ca. 268, Clifford v. Ashley.

If a trustee by fraud and combination with the *cestui que trust, endeavour to evade any penal law*, as the statute of simony, &c., under pretence that a trust is only cognisable in equity, and that equity should not assist a penalty or forfeiture: yet Chancery will aid remedial laws, and not suffer its own notions to be made use of to elude any beneficial law.

1 Abr. Eq. Ca. 131, Attorney-general v. Hindley.

β (O) Compensation to Trustees.

WHERE the testator directed his trustees to be allowed all expenses, and for professional assistance and for loss of time, one being a surveyor, superintended the sale of the real estate; held to be entitled to compensation for loss of time.

Willis v. Kibble, 1 Beav. 559.

When a solicitor acts as trustee, he cannot charge for his services rendered in his character of solicitor, unless there be some special contract authorizing him to make such charge.

Sherwood, ex parte, 3 Beav. 338.

In New York, a trustee is not entitled to commissions on sales of the trust estate, nor to any compensation for his care and pains in executing the trust; but he is entitled to an allowance *per diem* for his time, expenses incurred in travelling, &c.

Green v. Winter, 1 Johns. Ch. 27; Manning v. Manning, 1 Johns. Ch. 527.

(P) Of Suits by and against Trustees and *Cestuis que trust.*

Commissions allowed to a trustee, as a compensation for his skill and trouble, are not to be lessened or withheld, because of conduct in respect of which he had been charged with interest.

Winder v. Diffenderffer, 2 Bland, 167.

A solicitor, who is trustee, is not entitled to charge for his professional services, which must be assumed to have been rendered in his character of trustee; but under a contract properly entered into, he may be entitled to his professional charges.

In re Sherwood, 3 Beav. 338; Moore v. Frowd, 3 My. & Craig, 45.

Where business relating to a trust-estate was transacted by two solicitors in partnership, one of whom was a trustee of the estate; held, in passing his accounts, that costs out of pocket could alone be allowed.

Collins v. Corey, 2 Beav. 128.

A stipulation by a trustee for compensation for his personal services, includes all his expenses, whether fixed or contingent, but excludes a compensation for services, if it would be improper otherwise to allow any.

M'Millen v. Scott, 1 Monr. 151.

On his assuming the trust, a trustee is not justly entitled to an allowance by way of commission, but he may be allowed, as a compensation for his services, a commission on the net income of the property which he holds in trust after he has collected such income.

Dixon v. Homer, 2 Metc. 420; Langley v. Hall, 11 Pick. 120.

Commissions may be allowed in a trustee's account, in addition to an allowance of specific charges for services, provided the whole does not exceed a just compensation; such compensation being considered for services not specifically charged.

Rathbun v. Collon, 15 Pick. 471.

The usage which exists among merchants, factors, and others, who undertake to manage the interests or concerns of others, and the highest rate at which such services are usually paid for, is the rule which ought to be followed in allowing commissions to trustees.

Barrell v. Joy, 16 Mass. 221.

In Maryland, by an equitable construction of, and by analogy to the statutes of that state, allowing commissions to executors, guardians, and trustees, under judicial sales, commissions may be allowed to conventional trustees, though there was no agreement between the parties to that effect.

Ringgold v. Ringgold, 1 Har. & Gill, 11.

In Pennsylvania, under the equity of the act which allows commissions to executors, trustees are also entitled to claim them.

Provost v. Gratz, 3 Wash. C. C. R. 434; Burr v. M'Ewen, 1 Bald. 154. See as to the amount allowed, Nathan v. Morris, 4 Whart. 389.

(P) Of Suits in Equity and Actions at Law by and against Trustees and *Cestuis que trust.*

A TRUSTEE and *cestui que trust* may properly unite as complainants in a bill to recover the trust fund.

Jennings' Executors v. Davis, 5 Dana, 128.

A trust fund must be reached by a suit against the trustees, not against the *cestui que trust.*

Thomas's Trustees v. Brashear, 4 Monr. 68.

(Q) Miscellaneous Cases.

Where there is a trust-estate, the trustee is answerable for damages, as on an implied assumpsit, to the *cestui que trust*, that he would execute the trust.

Newhall v. Wheeler, 7 Mass. 189.

The *cestui que trust* of a mortgage cannot maintain an action for possession of the land mortgaged.

Sommes v. Skinner, 16 Mass. 348.

Although a *cestui que trust*, after a trust is satisfied, may maintain ejectment, that does not deprive the trustee, holding the legal title, of his right to maintain such action.

Hopkins v. Stephens, 2 Rand. 422.

A *cestui que trust*, who has paid the consideration of lands conveyed, may claim the benefit of a resulting trust, and he will be considered as holding the legal estate so far as to be enabled to maintain or defend an action of ejectment.

North Hampstead v. Hampstead, 2 Wend. 109.

In law, trustees constitute but one person; they must, therefore, join in bringing an action.

Brinkerhoof v. Wemple, 1 Wend. 470.

As a general rule, the *cestuis que trust* should be made parties, more especially when they are to be divested of title.

Piat v. Oliver, 2 M'Lean, 267.

The grantee of a *cestui que trust* filed a bill against the trustee to obtain the legal title; held, that the grantor need not be a party either as complainant or defendant.

Elliott v. Armstrong, 2 Blackf. 198.

A trustee may maintain ejectment in his own name; and a third person cannot set up the title of the *cestui que trust* to defeat the recovery.

Chahoon v. Hollenbach, 16 S. & R. 425.

In Pennsylvania, the *cestui que trust* may bring ejectment in his own name.

Kennedy v. Fury, 1 Dall. 72.

(Q) Miscellaneous Cases.

A CORPORATION aggregate is capable of taking and holding property as a trustee.

Phillips' Academy v. King, 12 Mass. 546; Sutton v. Coal, 3 Pick. 232; Amherst Academy v. Cowles, 6 Pick. 427; Vidal v. Girard's Executors, 2 How. S. C. Rep. 127.

When a will directs acts to be done which necessarily require the intervention of a trustee to hold the property, the executor is trustee by necessary implication.

Nash v. Cutler, 19 Pick. 67. See 8 Pick. 464; 9 Pick. 395; 13 Pick. 328; 6 Mass. 37; 15 Mass. 113.

When one is authorized and required to take an obligation to himself for the use and benefit of another, and no mode of proceeding is prescribed, it is the intention of the legislature that the obligee shall be deemed a trustee for the party interested, and be liable accordingly.

Crane v. Keating, 13 Pick. 339.

(Q) Miscellaneous Cases.

A purchaser under a deed of trust can hold only subject to the stipulations and conditions contained in such deed.

Payne v. Webster, 1 Verm. 101.

A trustee cannot alien the trust fund in payment of his own debts.

Graff v. Castleman, 5 Rand. 195.

When a trustee is obliged to employ an agent, and does so in good faith, he is not responsible for any loss of the trust fund, arising from the subsequent insolvency of the agent.

Potts v. Trotter, 2 Dev. Eq. 281.

Where a trust of land is wholly nominal, the trust becomes executed in the *cestui que trust*, and he may maintain ejectment for the recovery of the lands in his own name, without a previous conveyance from the trustee.

Welch v. Allen, 21 Wend. 147.

Courts of law will protect the rights of a *cestui que trust*, against any person having notice of the trust.

Anderson v. Van Alen, 12 Johns. 343; Stiver v. Stiver, 8 Ohio, 217. See Harrisburg Bank v. Tyler, 3 Watts & S. 373; Lee v. Tierman, Addis. 349; Scott v. Gallaher, 14 S. & R. 333.

Whenever the trust fund is converted into some other species of property, it is liable in its new form to the *cestui que trust*, if its identity can be traced. In such case the *cestui que trust* may exercise his option either to take the property or pursue some other remedy.

Piatt v. Oliver, 2 M'Lean, 267.

Under the common law, the trustees charged with collecting the interest on a bond, on the insolvency of the obligor, have a right to exchange the bond for the note of a third person, especially if the *cestui que trust* sanction the transaction.

Morgan et al. v. Their Creditors, 6 Mart. N. S. 415.

The clause in a deed of trust regarding the consideration, is to prevent a resulting trust in the grantor, and to estop him for ever from denying the deed for the uses therein mentioned.

Belden v. Seymour, 8 Conn. 304.

When the trust is for the payment of debts generally, a purchaser under the trustee is not bound to see to the application of the purchase-money, although he has notice of such debts.

Grant v. Hook, 13 S. & R. 262. See Bruch v. Lantz, 2 Rawle, 417.

USURY.

USURY, in a strict sense, is a contract upon the loan of money to give the lender a certain profit for the use of it upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be paid on the day appointed or not.

1 Hawk. P. C. c. 82, § 1. β Usury is the illegal profit which is required and received, by the lender of a sum of money, from the borrower for its use. Bouv. L. D. h. v. g

And in a larger sense it seemeth, that all undue advantages taken by a lender against a borrower, came under the notion of usury, whether there were any contract in relation thereto, or not; as, where one in possession of land, made over to him for the security of a certain debt, retains his possession after he has received all that is due from the profits of the land.

1 Hawk. P. C. c. 82, § 2.

The consideration of this offence may be reducible to the following heads, wherein we shall inquire,

(A) Of Usury at Common Law.

(B) Of Usury by the Statute Law.

(C) What Kinds of Agreements or Contracts shall be deemed usurious, and what not.

(D) What Kind of Hazard or Casualty will bring an Agreement, &c., out of the Statute of Usury.

(E) In what Cases Securities shall be forfeited or avoided on account of Usury.

(E) In what Cases a Forfeiture or Treble Value shall be incurred on account of Usury.

(G) In what Cases Relief is given against usurious Contracts.

(H) How far Sureties are affected by usurious Contracts.

(I) What Informations will lie in Cases of Usury, and where they are good and where not.

(K) Of the Pleadings in Cases of Usury.

(L) Of the Trial and Evidence in Cases of Usury.

(A) Of Usury at Common Law.

ANCIENTLY it was holden to be absolutely unlawful for a Christian to take any kind of usury, and that whosoever was guilty of it was liable to be punished by the censures of the church in his lifetime; and that if after death any one was found to have been a usurer while living, all his chattels were forfeited to the king, and his lands escheated to the lord of the fee.

Hawk. P. C. c. 82, § 4. But *per* Hale, C. J., Jewish usury, being 40 *per cent.* and more, was prohibited at common law, but no other. Hardr. 420, Anon. ‖ Lord Coke lays it down that by the effect of the statutes 37 H. 8, and 13 Eliz. the common law as to usury is done away. 3 Inst. 152. See this opinion controverted at length, Plow-

(B) Of Usury by the Statute Law.

den on Usury, p. 1, c. 11, where see some information on the ancient state of the law as to usury by Jews and by Christians, and as to Judaism in England generally; and see Ibid. Append.‖

Also, it seemeth to have been the opinion of the makers of some acts of parliament, as 5 Ed. 6, c. 20; 13 Eliz. c. 8, § 5, and 21 Jac. 1, c. 17, § 5, that all kinds of usury are contrary to a good conscience.

Hawk. P. C. c. 82, § 5.

And agreeably thereto it seemeth formerly to have been the general opinion, that no action could be maintained on any promise to pay any kind of use for the forbearance of money, because that all such contracts were thought to be unlawful, and, consequently, void.

Hawk. P. C. c. 82, § 6.

But it seemeth to be generally agreed at this day, that the taking of reasonable interest for the use of money is in itself lawful, and, consequently, that a covenant or promise to pay it, in consideration of the forbearance of a debt, will maintain an action; for why should not one who has an estate in money be as well allowed to make a fair profit of it as another who has an estate in land? And what reason can there be, that the lender of money should not so well make an advantage of it as the borrower? Neither do the passages in the Mosaical law, which are generally urged against the lawfulness of all usury, if fully considered, so much prove the unlawfulness as the lawfulness of it; for if all usury was against the moral law, why should it not be as much in respect of foreigners, of whom the Jews were expressly allowed to take it, as in respect of those of the same nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, that the prohibition of it to that people was merely political, and, consequently, doth not extend to any other nation.(*a*)

Hawk. P. C. c. 82, § 7. ‖(*a*) And such was the opinion of Grotius and Puffendorf, who have treated the subject at length. For a full statement of the reasonings on the question, whether receiving interest for money is against conscience and natural law, and for a refutation of the old and vulgar errors which held it to be so, see Grotius de Jure B. et P. lib. xi. c. xii. § 20. Puffendorf, Droit de la N. lib. v. chap. vii. § 8, 9, 10. Rutherforth's Instit. N. L. b. i. c. xiii. The passage in St. Luke, c. xix. v. 22, "Wherefore then gavest thou not thy money into the bank, that at my coming I might have required mine own with usury?" (and see St. Matt. c. xxv. v. 27,) seems to show that the usage existed at Jerusalem of placing money at interest in the hands of bankers, and was not deemed unlawful. The old statutes, legalizing interest at certain rates, bear witness to the violent prejudices against the practice. The statute 13 Eliz. c. 8, which allows 10 *per cent.* interest, recites, "that all usury being forbidden by the law of God is sin, and detestable;" and the 21 Jac. 1, reducing the rate to 8 *per cent.*, provides, that "nothing in the law shall be construed to allow the practice of usury in point of religion or conscience." Rolle says, that this clause was introduced to satisfy the bishops, who would not pass the bill without it. Oliver v. Oliver, Roll. R. Calvin and St. Thomas Aquinas both agree that the receipt of usury is not contrary to Scripture. Calv. Epist. de Usurâ; St. Thomas Aqu. Op. de Usur. c. 4. See the question as to the policy of laws regulating the rate of interest discussed with ingenuity and clearness by Mr. Bentham. "Defence of Usury, showing the Impolicy of the present Legal Restraints," 1818.‖

(B) Of Usury by the Statute Law.

By the 37 H. 8, c. 9, and the 13 Eliz. c. 1, the rate of interest is not to exceed 10*l.* in the 100*l.* By—

The 21 Jac. 1, c. 17, § 2, *None shall upon any contract, directly or indirectly, take for the loan of any money, or other commodities, above the*

rate of 8*l. for* 100*l. for one whole year, in pain to forfeit the treble value of the money, or other things lent.*

§ 5. *This law shall not be construed to allow the practice of usury in point of religion or conscience.*

By the 12 Car. 2, c. 13, § 2, *None shall take, directly or indirectly, for the loan of money, or other commodities, above the value of* 6*l. for the forbearance of* 100*l. for one year, and so after that rate, and all bonds, contracts, &c., whereupon more shall be reserved, shall be void. They that receive more, shall forfeit the treble value of the money or other things lent.*

12 Car. 2, c. 13, § 2. A mortgage was made at 8*l.* per cent. *before the making of this statute*, reducing interest to 6*l. per cent.* The mortgagor *continued paying interest of* 8*l.* per cent. *for fifteen years after this statute*, and then the mortgagee entered. The mortgagor brought a *bill to redeem.* The question was, Whether the 2*l. per cent.* received for the fifteen years should not be allowed in discharge of so much principal? The court denied relief as to the money paid by the plaintiff; but decreed 6*l. per cent.* only, to be allowed from the defendant's entry on the estate. 2 Vern. 42, pl. 37, Walker v. Penry.——On a rehearing, the decree was confirmed as to the 2*l. per cent.* Ibid. 78, pl. 73. Lord C. Jefferies having been of opinion, that the statute had *no retrospect* beyond 1660, but looked forwards to contracts and agreements then after to be made, and not to any contracts and agreements before that time, and having decreed account to be taken accordingly as above, now upon the bill of review, Lord Commissioner Trevor, because there was a decree already made in it, would not reverse it; but Lords Commissioners Rawlinson and Hutchins, on reading the act of parliament, held the act had a retrospect, and makes it unlawful to take more than 6*l. per cent.*, upon any contracts whether made before or after the act of parliament; but that part of the statute which adds penalties, relates only to contracts and agreements then after to be made. 2 Vern. 145, 146, pl. 141; Walker v. Penry.——Abr. Eq. Ca. 288, (D,) pl. 1, cites 2 Vern. 145, S. C. And adds, that Rawlinson and Hutchins, Lords Commissioners, held the decree should be reversed against Lord Trevor. ‖As to the question, whether the statute should have a retrospective effect, see tit. *Statute*, (C.)‖

But *the* 12 Ann. stat. 2, c. 16, enacts, *That no person upon any contract, which shall be made after the* 29*th of September*, 1714, *shall take for loan of any money, wares, &c., above the value of* 5*l. for the forbearance of* 100*l. for a year; and all bonds and assurances for payment of any money to be lent upon usury, whereupon or whereby there shall be reserved or taken above five in the hundred, shall be void; and every person which shall receive, by means of any corrupt bargain, loan, exchange, chevisance, shift, or interest of any wares, other things, or by any deceitful way, for the forbearing or giving day of payment for one year, for their money or other things, above* 5*l. for* 100*l., for a year, &c., shall forfeit treble the value of the moneys or other things lent.*

It seems to be now settled, that the statute of 12 Ann. c. 16, which reduces the money to 5*l. per cent.*, has not a retrospect to any debts contracted before; but that they should carry interest according to the interest allowed, or agreement made at the time of the debt contracted. And Serjeant Hawkins, from the expositions made of former statutes, says that a contract made before the statute is no way within the meaning of it, and therefore it is still lawful to receive 6*l. per cent.* in respect of any such contract. Hawk. P. C. c. 82, § 10.

The expositions which have been made of the former statutes being very applicable to the last, which is almost in the same words, the proper construction of it will be best collected by a due attention to the following heads.

[By st. 3 G. 1, c. 8, § 39, The Governor and Company of the Bank of England are enabled to borrow money at such rate of interest as they may think fit, although the same may happen to exceed the interest allowed by law to be taken.

(B) Of Usury by the Statute Law.

||By 3 G. 1, c. 9, § 16, the same liberty is given to the South Sea Company.||

It is declared by 14 G. 3, c. 79, that all mortgages and other assurances of lands, and their assignments or transfers, in Ireland and the plantations, for securing money already executed in Great Britain, shall be as valid as if executed on the mortgaged lands, and shall continue to carry interest at the rate allowed of by the laws of the colony where the mortgaged lands lie: but as to future loans, the act limits them to 6*l. per cent.*, and provides against fraud by confining the loan to the real value of the lands, &c. It likewise gives treble forfeiture of the sum borrowed beyond the value of the land mortgaged; and, for greater notoriety and certainty, requires all such mortgages or transfers to be registered in the country where the lands lie, else to remain liable to the 12th of Anne.

This act relates only to mortgages and other securities relating to *lands* in Ireland and the West Indies, but does not extend to *personal contracts*. Dewar v. Span, 3 Term R. 425.]

||An act (1 and 2 G. 4, c. 51) was passed to explain the above act of 14 G. 3, c. 79. But the 1 and 2 G. 4, c. 51, is now repealed by the 3 G. 4, c. 47, except as far as regards any mortgages or securities executed before the passing of this last-mentioned act.

And by 3 G. 4, c. 47, § 2, it is enacted that all mortgages and securities already made or to be made in Great Britain of any lands, tenements, or hereditaments, slaves, cattle, or other things being in Ireland or any of the colonies in the West Indies, for securing payment of any money thereon lent and advanced, with interest for the same, whether payable in Great Britain or in the country, island, &c., where the lands, &c., comprised in such mortgage are situate, and also all conveyances, demises, or other assurances of any lands, &c., in Ireland or any of the colonies, and all bonds and covenants made or to be made or entered into in Great Britain either by the person borrowing such money, or by any person residing in Great Britain or elsewhere, whether made by way of collateral security for payment of such interest, or for securing the payment of interest on the money so advanced at any higher rate than the rate of interest which such securities bear or carry, and whether such collateral or other securities for such interest have been made or shall be made and entered into at the time of making such mortgages or securities, or at any time subsequent thereto, and whether the same shall be made to the original mortgagees or their representatives, or to any person to whom such mortgages, &c., have been assigned, and all transfers and assignments made or to be made in Great Britain of such mortgages, securities, demises, bonds, &c., shall be as good, valid, and effectual as such mortgages, securities, &c., would have been if the same had been respectively made or entered into, and the interest secured thereby had been made payable, and the person making such assurances, bonds, &c., for securing such interest or additional interest as aforesaid, had resided in the country, island, &c., where the lands, &c., comprised in such mortgage, &c., lie or are; and none of His Majerty's subjects shall be liable to the penalties of the act of Queen Anne for receiving interest for the sums lent on any such mortgage, &c., so as the total amount of the interest so received do not exceed the rate allowed by the law of the country, island, &c., where the lands, &c., comprised in such mortgage, &c., severally lie or are.||

(C) What Kinds of Agreements or Contracts shall be deemed usurious, and what not.

It hath been resolved, that an agreement to pay double the sum borrowed, or other penalty on the non-payment of the principal debt at a certain day, is not usurious, because it is in the power of the borrower wholly to discharge himself, by repaying the principal according to the bargain.
Hawk. P. C. c. 82, § 3.

{A contract to pay a larger sum at a future day upon non-payment of the sum agreed upon at a prior day is not usurious, but the increased sum will be considered as a penalty, and relievable against in a court of equity upon compensation being made; and that compensation is legal interest, unless some specific damage can be shown.
1 Wash. 1, Groves v. Graves; Ibid. 119, Winslow v. Dawson.}

But, if it were originally agreed, that the principal money should not be paid at the time appointed, and that such clause were inserted only with an intent to evade the statute, the whole contract is void; for the construction of cases of this nature must be governed by the circumstances of the whole matter, from which the intention of the parties will appear in the making of the bargain, which, if it was in truth usurious, is void, however it may be disguised by a specious assurance.
Hawk. P. C. c. 82, § 19.

So, if both principal and interest be secured, yet, if it be *at the will* of the party who is to pay it, it is no usury; *per* Doddridge, J. As, if I lend to one 100*l.* for two years, to pay for the loan thereof 30*l.*, and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party has his election, and may discharge himself by paying it at the first year's end.
Cro. Ja. 509, pl. 20, Roberts v. Trenayne.

But, if a man contracts *to pay more interest than the statute allows, if the plaintiff requires it*, though the plaintiff *never does require it*, yet it is within the statute of usury.(*a*)
Vent. 234, Hedgeborough v. Rofenden. (*a*) It has been held, that an assurance for the payment of fifty shillings for the use of 100*l.* for six months, the computation shall be by calendar and not by lunar months, because by the latter the interest would exceed the rate allowed by the statute. Hawk. P. C. c. 82, § 13.

Nevertheless it has been held, that if one *contracts to have more than the statute allows, but he takes nothing of the interest contracted for*, he is not punishable by the statute; *but if he takes any thing, if it be but a shilling*, it is an affirmance of the contract, and he shall render for the whole contract.
Mallory v. Bird, cited in Pollard v. Scoly, Cro. Eliz. 26.

So, if I lend 100*l.* *without any contract for interest*, and afterwards at the end of the year the borrower gives me 20*l.* for the loan thereof, the same is within the statute; for my *acceptance* makes the offence without any contract or bargain. *Per* Gent, J.
Le. 96, pl. 125, in Sir Woollaston Dixy's case.

Where a man *for* 100*l.* *sells his land, upon condition* that *if the vendor or his heirs repay the sum before the feast of Easter*, or such like, then next following, that then *he may re-enter*, this is no usury; for he may repay the next day, or any time before Easter, and therefore he has no gain certain to receive any profits of the land.
Bro. *Usury*, pl. 1. But, if the condition be that the vendor repay such a day a year, or two years after, this is usury; for he is sure to have the land and the rents and profits for that year, or for those two years. Ibid. ibid.

(C) What Agreements or Contracts deemed usurious, &c.

But, where B *delivered wares of the value of* 100*l.* and no more, and *took a bond*, with a condition to *re-deliver the wares to B within a month, or to pay* 120*l. at the end of the year*, the obligation was adjudged void by the statute of usury.

Mo. 397, pl. 520, Reynolds v. Clayton, cites it as adjudged in B. R. Becher's case.

So, if A comes to borrow money, and B says he will not lend money, but *he will sell corn*, &c., and give day for payment at such a rate, which *rate* exceeds 10*l.* in the 100*l.* it is usury.

Mo. 398, pl. 520, cites it as Wick's case of Gloucestershire; βEvans v. Negley, 13 S. & R. 218.ϐ

If one gives the *profits of his lands*, worth 10*l.*, for interest for a year of 100*l.*, though he *receives part* of the profits *daily*, this is not usury above 10*l.* for the 100*l.* *Per* Popham, Gawdy, and Yelverton; but Fenner *è contra.*

Mo. 644, pl. 890, Worley's case.

So, where *one mortgaged land for* 100*l.* and *took bond for the interest of* 8*l. a year, payable half-yearly;* the question was, Whether that makes the bargain usurious against the statute, because, as it was insisted, the use ought not to be paid until the end of the year, and contracting to have half of it *half-yearly*, it is not warrantable by the statute? But the court held, that it is not any usurious contract contrary to the statute, because the 100*l.* is lent for a year, and the reservation is not of more than what is permitted by the statutes;(*a*) and the reserving it half-yearly is allowable; for he does not receive any interest for more or less time than his money is forborne. It was adjudged for the plaintiff, and affirmed in error.

Cro. Car. 283, Gryfill v. Wytchott. ‖(*a*) The 21 Jac. 1, c. 17, was then in force, in which 8*l. per cent.* is the legal rate.‖

It is to be observed, that the loan of money for interest allowed by the statute, shall not be construed to be within the purview of it, in respect of any expectations which the lender may have of a voluntary gratuity, to be given him by the borrower, if there be no kind of agreement relating to it.

Hawk. P. C. c. 82, § 18; ‖but see 2 Bos. & Pul. 381.‖

But a contract reserving to the lender a greater advantage than is allowed by the statute, is equally within the meaning of it, whether the whole be reserved by way of interest, or in part only under that name, and in part by way of rent for a house, let at a rate plainly exceeding the known value.

Hawk. P. C. c. 82, § 22; [3 Atk. 154; Cowp. 795.]

‖ H having taken a building lease of land at 108*l.* per annum, assigned over the lease to R for 2300*l.*, (the value of the premises being proved to be about 800*l.*,) and on the same day agreed to take the premises as tenant to R and subject to the same covenants as in the building lease, but at an increased rent of 395*l.*; and there was a stipulation that H should be at liberty, upon giving six months' notice, to re-purchase the lease for the sum of 2300*l.* On H's becoming bankrupt, his assignees brought an ejectment against the tenant, claiming under R, and the learned judge left it to the jury to say whether the transaction was substantially a purchase, or a loan by R to H. If they thought the latter, the deeds were void for usury; and the jury having found it the latter, the court refused to disturb the verdict.

In such cases it is a question of fact for the jury, whether the transaction is *bonâ fide*, or a colour for an usurious loan.

Doe dem. Grimes v. Gooch, 3 Barn. & Ald. 664; and see Doe dem. Metcalf v. Brown, Holt's R. 295; Metcalf v. Brown, 5 Price, 560; Doe v. Chambers, 4 Camp. 1. As to cases where a lease granted in consideration of a loan of money is considered usurious, see 1 Ball. & Bea. 116, 125, 129; 1 Scho. & Lef. 182; 2 Ibid. 218.

Where a broker carried bills to be discounted, and allowed to the person discounting, interest at the rate of 5*l. per cent. per annum*, and, in addition, 1*l.* per cent. on the amount of the bills towards the payment of a debt due from a third person to the discounter, but which the broker thought himself bound in *honour*, though not in law, to pay, and the broker accounted to his principal for the whole amount of the bills, *minus* lawful discount and commission; it was held, that the transaction was not usurious. If the discounter of a bill engage with the holder that he shall pay the agent procuring the discount a premium, in addition to the legal interest, this is usurious, although the discounter himself only take the legal discount.

Solarte v. Melville, 7 Barn. & C. 431; Meagoe v. Simmons, Moo. & Malk. Ca. 121.‖

A bankrupt having *borrowed* a great sum of *money* of the defendant *for one quarter of a year, he was to give* the defendant 6*l. for every* 100*l.* that he borrowed; *and some silk being the security, he was to give him one pound more* for every 160*l.* for that quarter, *for the use of his warehouse.* The question upon the trial was, Whether this contract made between the bankrupt and the defendant is a usurious contract? and the jury having found a verdict for the defendant, Serjeant Cheshire moved for a new trial; for he said the verdict was against law. Holt, C. J., said he thought it was a wrong verdict, and it was ordered to be moved again.

Holt's R. 706, Le Blanc et al. v. Harrison.

[One broker had borrowed of another on a note of hand 45*l.* on demand, to purchase certain goods that were then on sale, on condition of having the future profits on the re-sale. The goods were purchased and re-sold for 5*l.* profit, the lender demanded his money within two hours after the lending, which made it carry interest; and the action was brought for 2*l.* 10*s.* over and above the principal and interest: the plaintiff was non-suited: for Lord Mansfield was of opinion, in which the three other judges concurred, "that the intention of the contract was to get more than principal and legal interest on the note, which is *usury* within the meaning of the statute."

Jeston v. Brooke, Cowp. 793.

The plaintiffs, who were gold-refiners, had advanced gold wire to others in the same trade, upon the terms of paying such a price if the money were paid within three months; and if not, then to pay at the rate of a halfpenny an ounce *per* month, over and above the price agreed for; which in fact, upon calculation, exceeded the rate of 5*l.* per cent. This at the trial was found to be the constant usage of the trade. A verdict was given for the plaintiff, and a question reserved for the opinion of the court, Whether this contract was usury? Under all the circumstances, especially the constant usage of the trade, the court was of opinion, that it did not amount to usury within the statute. But though this transaction cannot be considered as usury within the statute, yet in a subsequent case under these circumstances, where the defendant had paid into court the principal and

interest at 5*l.* per cent. from the time of the bargain, the court would not allow the plaintiff in an action for money had and received to recover the excess of interest, notwithstanding it appeared manifestly at the trial, that such excess was only to be taken in case of delay of payment at the end of three months, and for no other reason whatever.

Floyer v. Edwards, Cowp. 112; Plumbe v. Carter, Ibid. 116.]

‖ Where a contract was made for sale of an estate at a certain price, and it was agreed that this should be paid by instalments at future days with interest at 6*l.* per cent. per annum, and promissory notes were given for these sums compounded of the instalments and of that which was called interest, it was held that the whole must be considered as the purchase-money of the estate, and that the bargain was not usurious.

Beete v. Bidgood, 7 Barn. & C. 453.‖

If a sum of money is given in consideration of an annuity, though the yearly payment exceeds the rate of interest, yet it is not usury. Thus,

Where A *asked to borrow of* B upon interest, and B *refused to lend* for interest; *but said that for rent or annuity he would;* and so it was agreed, and a rent granted for twenty-three years, amounting to no more than the statute allows for interest, &c.; it seems, that this is not usury within the statute.

And. 121, pl. 169, Finch's case.

If A gives 30*l.* to B, to have *an annuity of* 5*l.* assured to him *for* 100 *years, if* A and his wife and four of his children *so long shall live;* this is not within the statute of usury. So, if there had not been any condition. But care is to be taken, that there be no communication of borrowing of any money before.

4 Le. 208, pl. 334, Fuller's case.

So, where A on the 17th of July, 1579, lent 100*l.* to B, who thereupon granted to A and his heirs an *annuity of* 20*l. a year, on condition that if* the said B, the *grantor, paid to A, at Christmas* 1580, *the said* 100*l.*, that then *the annuity should cease;* adjudged, this is not within the statute; for nothing was to be paid for interest within a year and a quarter after the grant; and if the 100*l.* had been paid on the day, the annuity was to cease without paying any thing; so that it is only a plain bargain, and a conditional purchase of an annuity.

5 Rep. 69, Burton's case.

But, if it had been *agreed* between A and B, *that notwithstanding such power of redemption, the* 100*l. should not be* paid *at the day*, and *so* that the *clause of redemption was inserted to evade the statute*, then this had been a usurious contract and bargain within the statute; for if in truth the contract be usurious against the statute, no colours or show of words will serve, but the party may show it, and he shall not be concluded or estopped by any deed in any other matter whatsoever; for the statute gives averment in such case.

5 Rep. 69, Burton's case.

Where A for 100*l. granted a rent of* 20*l. for eight years, another of* 20*l. a year for two years, if B, C, and D, should so long live;* in replevin the defendant avowed for the rent, and the plaintiff pleaded the statute of usury, and set forth the statute and a special usurious contract; it was said, that if it had been laid to be upon a loan of money, then it

was usury; but if it be a bargain for an annuity, it is no usury; but *that* this was alleged to be upon a lending.

Brownl. 180, Cotterell v. Harrington.

So, where in debt upon bond, the defendant *pleaded* the statute of usury, and *that he came* to the plaintiff *to borrow of him* 120*l.* *according to the rate of* 10*l.* per cent., *who refused to lend* the same, *but corruptly offered to deliver* 120*l.* *to him, if he would be bound to pay him* 20*l.* per annum, *during the plaintiff's wife's and his son's lives;* whereupon he entered into a bond; it was resolved, that this, being an absolute bargain, in consideration of the payment of 20*l.* *per annum*, during two lives and no longer, and *no agreement to have the principal money*, was out of the statute of usury; *but if* there had been *any provision for the repayment of the principal, although not expressed within the bond*, it had been a usurious agreement within the statute. And judgment for the plaintiff.

Cro. Ja. 252, pl. 7, Fountain v. Grimes; Hawk. P. C. c. 82, § 15, says, that the *grant of an annuity for lives not only exceeding the rate allowed for interest, but also* exceeding *the known proportion for contracts of this kind*, in consideration of a certain sum of money, is not within the meaning of the statute, unless there were some underhand bargain for the security of the repayment of the principal or consideration money. [And Mr. J. Burnet in Chesterfield v. Jansen, 2 Ves. 142, says:—"Supposing there is a purchase of an annuity at ever such an under price, if the bargain was really for an annuity, it *cannot be usury;* but, if the communication was about borrowing and lending, it may be usury within the statute: and how? If by reason of all the circumstances and the communication, the exility of the sum given, the original contract being a borrowing and lending, the court thinks the annuity was a mere devise to pay the principal with usurious interest to evade the statute, this will be within the statute; though in the face of the bargain it appears ever so fair a sale of an annuity, the contrivance of the annuity as the usurious reward for the loan of money shall not evade the statute made for the benefit of mankind. This I take to be the sum and substance to be collected out of the several cases. Tanfield v. Finch, Cro. Eliz. 26; Fuller's case, 4 Leon. 208, *et suprà.* Symonds v. Cockerill, Noy, 151; Cotterell v. Harrington, Brownl. 180, *et suprà*, and King v. Drury, 2 Leon. 7."]

A, after the statute 12 Car. 2, viz., 3 June, 13 Car. 2, *agreed to lend B* 100*l.;* and that for the forbearance thereof for the time underwritten, B, the defendant, *should pay* to A, the plaintiff, 120*l.* *as follows, viz.*, 40*l.*, *upon the* 20*th of January and* 20*th of July, by equal portions annually next after* the 20th day of the then instant month *July till the* 120*l.* *be paid;* which exceeded the rate of 6*l.* *per cent.* *And for the further security B gave a bond of* 200*l.*, *and confessed a judgment.* Twisden, J., said that the contract here was not usurious, but was a purchase of an annuity for three years.

Sid. 182, pl. 1, Rowe v. Bellasis. The plea in this case was held ill, being after judgment.

It is to be observed, that if the *agreement* of the parties be *honest*, but is *made otherwise by the mistake of a scrivener*, yet it is not usury.

3 Mod. 307, Ballard v. Oddey; see *post*, letter (E.) 3 Collier v. Nevill, 3 Dev. 30; Sussex Bank v. Shipman, 2 Harr. (N. J.) R. 497.

β A corrupt agreement, in which the minds of the parties meet, is necessary to constitute usury. Therefore, where more than lawful interest was reserved, with the knowledge of the lender, but without the knowledge of the borrower, it was held that the transaction was not usurious.

Smith v. Beach, 3 Day, 268. See Price v. Campbell, 2 Call, 110; Howell v. Auten, 1 Green's Ch. R. 44.

When a greater rate than legal interest is taken by a party to a contract,

upon a mistaken supposition of a legal right to do so, it is, nevertheless, a corrupt agreement within the statute.

Maine Bank v. Bretis, 9 Mass. 49.g

[An annuity was granted at six years' purchase for the life of the grantor, a clergyman, then of the age of thirty-two years, charged upon his living, with a clause for redemption at the option of the grantor, after the expiration of five years, for five years and a half's purchase. It was recited in the annuity deed, that the agreement had been made for a loan of the money, which was paid as the price or consideration for the annuity. But it appeared to the court, that this recital was made by the attorney without the privity or direction of his client, who really and substantially meant to purchase an annuity. The court determined, that the annuity was not usurious, and that the inaccuracy of the recitals in the instrument should not vitiate a contract that otherwise seemed to be a fair one. De Grey, C. J., in giving judgment in this case observed, "That it was essential to the nature of a usurious contract, that there must be, 1. A loan. 2. That illegal interest is to be paid for such loan. And it is essential to the nature of a loan, that the thing borrowed is at all events to be restored.(*a*) If that be *bonâ fide* put in hazard, it is no loan, but a contract of another kind. So also, if illegal interest is to be certainly paid, or even upon a reasonable possibility, the contract is usurious." To evade these principles, many expedients have been tried. 1. To make the interest precarious and uncertain. 2. To make the principal itself precarious. 3. Communication concerning a *loan* has sometimes infected the case, and turned a contract into usury. But then the communication must be mutual; and it must be with the party himself, and not with his attorney. There is no case where even a meditated loan has been *bonâ fide* converted into a purchase, and afterwards held usurious. 4. Inequality of price is also a suspicious circumstance, especially if very inadequate. 5. If a power of redemption be given, though only on one side, it is a strong circumstance to show it a loan, as in Hooper v. Lawley, 3 Atk. 278. But that alone will not be conclusive. 6. The form of the instrument. If that imports a loan, and it was so meant, the contract may become usurious. At the same time, if the transaction be *bonâ fide*, the blunder of an agent shall not make it otherwise, as in Buckley v. Guildbank, Cro. Ja. 677, where interest was made payable by such mistake two days after.(*b*) 7. Subsequent acts of the parties may also bea material evidence of intention.

Murray v. Harding, 2 Black. R. 859; 3 Wils. 390, S. C. In Lawley v. Hooper, 3 Atk. 278, Lord Hardwicke, in determining that an annuity granted by Lawley for his life, with a proviso for repurchasing or redeeming it, upon giving six months' notice to the grantee, was a loan, seemed to lay great stress upon the effect of the proviso. From the language his lordship used upon that occasion, an idea prevailed for a considerable time, that the inserting of such a proviso infected the deed with usury. It is manifest, however, from this case in Murray v. Harding, that a right in the grantor to determine the annuity for his own benefit, does not create that necessity or obligation of repaying the principal loan at all events, without which the courts have repeatedly declared usury against the statutes cannot be committed. And Lord Thurlow, in Irnham v. Child, 1 Bro. Ch. R. 92, said, *To sell an annuity, and make it redeemable, is not usury, because it is not a loan.* (*a*) That there must be a loan to constitute usury is laid down in several other cases. 2 Anders. 15, pl. 8; 22 Vin. Abr. 300, S. C.; Loveday's case, 8 Co. 65. But there may be usury where a party takes more than the law allows for the forbearance of a debt, and yet in that case there is no loan in the ordinary acceptation of the term. Thus in Pollard v. Scholy, Cro. Eliz. 20, "Pollard sold to the defendant some oxen to be paid for at a given time: when the time was

arrived, Scholy required a longer day for payment, and Pollard granted it, paying to him so much wheat, as exceeded in value the legal rate of interest. The defendant in debt pleaded the statute, and would avoid the contract; and the opinion of the justice was that the statute doth not make the contract void, which was duly made, but doth only avoid all contracts for usury; and this last contract is void, being against the statute, but the first was good being made *bonâ fide.*" See also Spurrier v. Mayoss, 1 Ves. J. 531. (*b*) ‖ That a mere mistake shall not make a transaction usurious, see 1 Freem. 253, 264; 3 Wils. 390; 1 Camp. R. 149.‖

If in truth it appear on the whole of the transaction that a loan was intended under colour of an annuity, and the mode of annuity was forced by the lender on the borrower, the court will consider it as usurious, notwithstanding a colourable contingency, as that the lender at the end of a given time engage to supply the borrower with money to redeem.

Richards v. Brown, Cowp. 770; {3 Bos. & Pul. 159.}

‖ An annuity for four lives, with a covenant by the grantor within thirty days after the expiration of the third life, to insure the fourth life to the amount of the sum paid for the annuity, is not an usurious contract, for the sum is placed in hazard.

In re Naish, 7 Bing. 150.‖ β The purchase of an annuity or other devise, to cover a usurious transaction, is unavailing; if the contract is tainted with usury, it has no force. Lloyd v. Scott, 4 Peters, 205.β

Dr. Battie, at the request of Moore, sold out 1000*l.* South Sea annuities, at a loss upon the whole of 76*l.*, and took a mortgage for 1000*l.* from Moore at 5*l. per cent.*, reducible to 4*l. per cent.* if the money were repaid in a given time. Dr. Battie afterwards sold out at Mr. Moore's request, 1400*l.* S. S. annuities at a loss upon the whole of 267*l.* 15*s.*, and took another mortgage from Moore for 1400*l.* with interest at 5*l. per cent.*, with a power to Moore to reinstate the 1400*l.* at any time within two years. Upon a bill for foreclosure, the Master reported the two principal sums of 1000*l.* and 1400*l.* with interest and costs due thereupon; which having been paid by the plaintiff into court, he brought his bill (*inter alia*) to be paid the several sums of 76*l.* and 267*l.* 15*s.*, with interest, insisting that the defendant ought to have been charged with them in the account. The defendant pleaded the proceedings under the decree in bar: his plea on being argued was ordered to stand for an answer, and two questions were made: 1. Whether it were usury? 2. Whether the court would relieve? As to the first, Lord Keeper Henley was clearly of opinion, that it was a shift within the statute; the plaintiff having received but 924*l.* instead of 1000*l.*, and 1132*l.* 5*s.* instead of 1400*l.*, and yet having paid as much interest as was equal to 5*l. per cent.* upon the sums of 1000*l.* and 1400*l.* His lordship therefore decreed payment.

Moore v. Battie, Ambl. 371.

But a mere loan of stock is not usurious, nor the payment of the dividends in the mean time, though they exceed the legal rate of interest. Thus, where A, to accommodate B, sold out stock, and lent B the money produced by the sale, on an agreement that B should replace the stock on a certain day, or repay the money lent on a subsequent day, with such interest in the mean time as the stock itself would have produced; it was adjudged, that this was not usurious, though the interest exceeded 5*l. per cent.* The loan was not originally usurious, because, for a limited time, the party borrowing had it in his power to repay the money or replace the stock itself, if he had chosen.

Tate v. Wellings, 3 Term R. 531.]

(C) What Agreements or Contracts deemed usurious, &c.

§A contract by which borrower agreed to pay to lender interest on Bank stock, received by him as cash at a certain price, when in fact the stock was worth less in the market, is usurious.

Astor v. Price, 7 Mart. N. S. 409.§

‖And so, where the defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.*, for which the plaintiff sued him, and the plaintiff was desirous of investing the amount in stock on the 19th November, 1803; and at that day the sum would purchase 908*l.* 16*s.* 7*d.* stock; in consideration of forbearance from his action, defendant gave plaintiff a bond for transferring to him the above sum of stock on the 19th of November, 1804, with such interest as such stock would have produced in the mean time; it was held, that this was not usury, since, if the stock fell, the plaintiff would be the loser.

Maddock v. Rumball, 8 East, R. 304; and see Saunders v. Kentish, 8 Term R. 162; Smedley v. Roberts, 2 Camp. 606; Clarke v. Giraud, 1 Madd. 511.

But if the lender of the stock reserves to himself the right of electing whether he will have the stock replaced, or the money produced by sale of it repaid, with interest at five *per cent.*, the bargain is usurious; since the principal and interest are in all events secured, and the lender takes the chance of a rise in the value of stock, without any risk in case of a fall; and whether the arrangement is effected by one instrument or by two,—one for the replacing of the stock, the other for the repayment of the money and interest,—makes no difference.

Barnard v. Young, 17 Ves. 44; White v. Wright, 3 Barn. & C. 273; and see Moore v. Battie, 1 Eden R. 273; Boldero v. Jackson, 11 East, 612; Chippendale v. Thurston, Moo. & M. Ca. 411; Parker v. Ramsbottom, 3 Barn. & C. 267.‖

{A bond was given in 1782, in the penalty of 50,000*l.* conditioned for the payment of 1000*l.*, "or such farther sum as shall be equal to the said 1000*l.* in 1774, that is to say, to purchase as much land and as many negroes as it might have done at that time," and was held not usurious.

2 Hen. & Mun. 550, Faulcon v. Harriss.

And an agreement for the purchase of stock, to be transferred at a future day, at a price below the then value, is not usurious.

5 Esp. Rep. 164, Pike v. Ledwell.}

[Where the borrower of money gave a bond for the payment of the principal and interest at 5*l. per cent.*, and covenanted at the same time also to pay the lender a certain portion of the profits of a trade carried on by him in partnership with another person, it was adjudged to be usury; for the principal was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency: as between the lender and the partners in the business, he was not liable to contribute to the losses in the trade. Here is a provision to receive the profits, but none to engage for the losses of the trade.

Morse v. Wilson, 4 Term R. 353.]

‖Gilpin covenanted with Enderby that they should become partners in the business of army clothiers for ten years, and that Gilpin should advance 20,000*l.* as part of the capital for carrying on business, and that Enderby should find another like sum, and that E should have 2000*l. per ann.* out of the profits, or out of the capital in case of a deficiency, as his share of profits, the rest of the profits to be taken by Gilpin: and G covenanted that, on the determination of the partnership, the said 20,000*l.*

should be repaid to E, and that G should guarantee the debts and losses of the firm; and that in case the partnership effects should be reduced below 20,000*l.* it should be lawful to determine it, on notice, and that the 20,000*l.* should be repaid to Enderby on the dissolution. In an action brought by Enderby to recover the 20,000*l.*, Gilpin pleaded, that the deed was executed by way of shift, in pursuance of an usurious agreement. The issue on this plea having been found for the plaintiff below, negativing the corrupt agreement, and judgment being given for the plaintiff below by the C. B., on error brought, the K. B. held, that *after the verdict* found, the deed must be taken to disclose the real intention of the parties, and that it was not therefore void on the ground of usury: and judgment was affirmed.

Gilpin v. Enderby, 5 Barn. & A. 954; 5 Moo. 571; and see Fereday v. Hordern, Jacob. 144; Anderson v. Maltby, 2 Ves. jun. 248.

If a factor, advancing money for the purchase of goods, receives a higher commission on the purchases than he would have been content to take, had he not advanced the money, the transaction is usurious.

Harris v. Boston, 2 Campb. 348.‖

[On a bill praying that the defendants might be decreed to complete their purchase of certain houses, the defendants insisted that the contract for the purchase was usurious. The agreement was, to purchase the houses for 430*l.*, 200*l.* to be paid in money, and the remainder on a future day, with 5*l. per cent.* interest, or in default of payment, to pay a rent of 42*l. per ann.* till payment, subject to a deduction of 5*l. per cent.* for so much of the remaining sum of 230*l.* as should be then paid. Possession was delivered to the defendants. Adjudged not to be usury.

Spurrier v. Mayoss, 4 Bro. Ch. R. 28; 1 Ves. jun. 531, S. C. ‖See 3 Barn. & Ald. 644;‖ βEvans v. Negley, 13 S. & R. 218.g

A person paid 197*l.* for a note of 200*l.* which had three months to run, and at the expiration of that time took another note of 200*l.* upon advancing 3*l.* more for other three months. Upon an issue out of Chancery, Lee, C. J., held it usury. However, in the case of Lloyd v. Williams, Blackstone, J., said, "He conceived that interest may be as lawfully received beforehand for forbearing, as after the term is expired for having forborne. And it shall not be reckoned as merely a loan for the balance; else every broker in London, who takes 5*l. per cent.* for discounting bills, would be guilty of usury. For if, upon discounting a 100*l.* note at 5*l. per cent.* he should be construed to lend 95*l.* only, then at the end of the time he would receive 5*l.* interest for the loan of 95*l.* principal, which is above the legal rate." It has been since determined, that in discounting notes the common usage of charging something for trouble, &c., beyond the rate of legal interest, is not usurious, provided no corrupt bargain be made for taking usurious interest. So, in an action for usury, tried before Buller, J., against a banker at Sudbury, it appeared, that it was their constant usage to discount bills in London for their correspondents at Sudbury, for which the bankers charged, beyond the legal interest for the time the bills had to run, 5*s. per cent.* on the gross sum, without any reference to the time the bills had to run. The jury found for the defendant under the judge's direction.

Massa v. Dauling, 2 Stra. 1243; 2 Black. R. 793. ‖See Wade *q. t.* v. Wilson, 1 East, R. 195; Bodenham v. Purchas, 2 Barn. & A. 47;‖ Auriol v. Thomas, 2 Term R. 32; Winch v. Fenn, Sitt. after Hil. 1786;] ‖2 Term R. 52, n.;‖ {3 Bos. & Pul. 158.}

(C) What Agreements or Contracts deemed usurious, &c.

‖ All commission where a loan of money exists, must be considered as an excess beyond legal interest, unless it is ascribable to trouble and expense *bonâ fide* incurred in the course of business, transacted by the persons to whom such commission is paid; but whether any thing, and how much, is justly ascribable to this latter account, viz., that of trouble and expense, is always a question for the jury, who must, on a view of all the facts, exercise a sound judgment thereupon; and where there is a contrariety of evidence on the point, the court will not set aside the verdict, and grant a new trial, although the verdict may be against the judge's direction and opinion, unless it appears clearly that the jury have drawn an erroneous conclusion.

Carstairs v. Stein, 4 Maule & S. 201; and see Hamett v. Yea, 1 Bos. & Pul. 153; Palmer v. Baker, 1 Maule & S. 56; Stoveld v. Eade, 4 Bing. 81.

A charge by a bill-broker in the country, of 10*s.* *per cent.* for discounting a bill payable in London, has been held not usurious.

Ex parte Benson, 1 Madd. 112; and see 15 Ves. 120; 17 Ves. 332; ꞵMusgrove v. Gibbs, 1 Dall. 216; Wycoff v. Loughead, 2 Dall. 92; Raplee v. Morgan, 2 Scamm. 563; Lloyd v. Keach, 2 Conn. 175; 1 J. J. Marsh. 497.ꞵ

And a mere agreement that bankers shall accept and pay bills drawn on them, out of funds to be provided beforehand, for a commission of 5*s.* *per cent.*, cannot be usurious, since no *advance* of money is contemplated, which is essential to a usurious transaction. If an advance of money were contemplated in such an agreement, then it would be a question for the jury, whether the commission was a cover for usury, or a compensation for trouble.

Masterman v. Cowrie, 3 Camp. Ca. 487; and see Dagnall v. Wigley, 11 East, 43.

And so also the acceptor of a bill taking a premium of sixpence in the pound from the holder for the payment of the bill before it is due, is not usury, since there is no loan or forbearance: it is a very improper practice, but not usury.

Barclay *q. t.* v. Walmsley, 4 East, 55.‖

[If a promissory note be given for payment of a sum lent with usurious interest, and the note when due be taken up, and another note be substituted for it, the offence of usury is not thereby committed; nor is the penalty incurred till the latter note be paid.

Maddock v. Hammett, 7 Term R. 184.

ꞵ Where a note is renewed, from time to time, and interest added in; on a suit on the last note, held, that the jury may go back and overhaul the whole transaction, and give the lender only six *per cent.* for the money.

Baggs v. Louderback, 12 Ohio, 153. See Fields v. Gorham, 4 Day, 251; Botsford v. Sanford, 5 Conn. 276; Wales v. Webb, 5 Conn. 154.

A promissory note was made, and was valid in its inception; it was transferred by the payee on a usurious consideration. On this note an action was brought by the endorsee, and the defendant pleaded the intermediate usury to impeach the plaintiff's title; held, that this was a good defence.

Lloyd v. Keach, 2 Conn. 275

A usurious security is given up, and a new security is taken for the principal sum due and legal interest; held, that the latter is good.

Kilbourn v. Bradlay, 3 Day, 356.

(C) What Agreements or Contracts deemed usurious, &c.

A gave a usurious security, with B as surety for him; he then paid the amount of such security to B, who, in consequence of such payment, gave his own note to the creditor for the same amount: held, that the latter note was given on a new consideration, and unaffected by usury.

Scott v. Lewis, 2 Conn. 132. See Church v. Tomlinson, 2 Conn. 134, n.g

A, residing at Portsmouth, drew a bill for 600*l.* on S, in London. The bill was payable to the defendants, who were bankers in Portsmouth, or order, thirty days after date, and immediately after it was drawn, it was taken to the defendants, who gave their note for 600*l.* payable three days after sight at a house in London. For this the defendants received a discount of 5*l. per cent.*, calculating on the thirty days the bill had to run, but making no deduction on account of three days the note had to run after sight, or of the three days' grace which the bankers took thereon. Lord Kenyon said, he was clearly of opinion, that this was a usurious contract, whether the person discounting the bill chose to receive a note or money. If A chose to have a note payable in town, the defendants should not have taken interest for the time that note had to run, but should have computed their interest from the time it was payable.

Maddock v. Griffiths, Peake's N. P. Cas. 200.

{A, being a banker in the country, discounts bills at four months for B, and takes the whole interest for the time they have to run. B, on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills on London, some at three, some at seven, and some at thirty days' sight. After a verdict, finding the transaction not usurious, the court refused to grant a new trial, since the surplus of interest taken by A from his having made no rebate of interest on the bills on London might be referable to the expenses of remittance, and the jury were to judge whether giving the bills on London was a mere cover for a usurious contract.

1 Bos. & Pul. 144, Hammett v. Yea. Vide Peake, N. P. 200, Matthews v. Griffiths; 7 Term, 185, Maddock v. Hammett. So including in a note, given as security for an antecedent debt, a fair and reasonable charge for the expenses of the creditor in securing the debt, is not usury; and whether such charge was fair and reasonable is a question of fact to be left to the jury. 2 Day, 483, Kent v. Phelps.

The grantor of an annuity, having agreed with the grantee to redeem, draws a bill of exchange for 5000*l.* at three years, which the grantee discounts in the following manner: he takes 4083*l.* 6*s.* 8*d.* as the amount of the purchase-money and arrears, advances 166*l.* 13*s.* 4*d.* to the grantor in cash, and takes 750*l.* as interest for three years upon 5000*l.* The transaction is usurious.

3 Bos. & Pul. 154, Marsh v. Martindale.}

Where, upon a negotiation for a loan of money, the lender said, he could not advance money, but would furnish goods, which the borrower took and sold by the intervention of a broker recommended by the lender, and upon the issue of the negotiation the borrower, instead of 200*l.* which he meant to borrow, received only 117*l.* 2*s.* 2*d.*; the court held the transaction to be a loan of money for more than 5*l. per cent.* under colour of a sale of goods, and therefore usurious.

Lowe v. Waller, Dougl. 736; βPhilip v. Kirkpatrick, Add. 126; Huling v. Drexell, 7 Watts, 126, 129.g

B, a student of a college in Oxford, applied to A, a Jew, to raise him a

sum of money: A recommended one P, and P introduced him to V, who let him have the goods to the amount. A attended, and recommended the choice of the silks, for which B gave his note for 2224*l.* at twelve months' date. The silks were afterwards bought by one R for about half the price. The note was afterwards endorsed by V to D in the settlement of an account, who was completely ignorant of the transaction with B. Upon B's application to the court to compel the delivery up of the note, on payment of what the silks actually produced, Lord Thurlow said, "I am to inquire whether, under the mask of trading, this is not a method of lending money at an extraordinary rate of interest; and there is not a doubt that in this case the transaction was merely for the purpose of raising money, to supply the necessities of this young man. Do they deny knowing the goods were to be sold? I take it therefore as an advancement of goods instead of money to supply his necessities."

Barker v. Vansommer, 1 Bro. Ch. R. 149. In arguing this case, several other cases of a like tendency were cited; as that of Cecil v. Sutton and Roundtree in the Exchequer, where the defendants supplied the plaintiff with goods, in order to enable him to take up a note, and the court granted an injunction till the amount for which the goods sold should appear. In Lord Polwarth v. Cooke, his lordship had applied for the loan of 150*l.*, and Cooke gave him 50*l.*, a gold watch, and a Cremona fiddle; and the court ordered the securities to be given up on payment of what was obtained by sale.

A applied to B for the loan of 1500*l.* on mortgage: B said his money was in the funds, and that he had purchased at 75*l.*; if therefore A would have stock at that value, he would transfer as much as would amount to that sum; which he did, and A gave a mortgage accordingly for 1500*l.* A lost two and a half *per cent.* on the sale of the stock. The executor of B could not maintain an ejectment on the mortgage-deed; for in fact the deed was void by the statute; and, moreover, no action could be maintained on a contract usurious at common law.

Davison v. Barnard Pitt, Espin. N. P. 1.

So, if the discounter of a bill of exchange make the holder take goods at a higher price than they are worth upon a fair estimate, it is usury.

Pratt v. Willey, Ibid. 40.

But in the Duke of Ancaster v. Pickett, the court refused to relieve the Duke, who had purchased goods of Pickett, and had sold them again for less money; for the jewels were sold in the common course of trade, and not with any view of accommodating the Duke with the means of raising or borrowing money upon them.

1 Bro. Ch. R. 151.]

|| If the goods are forced upon the party for whom a bill is discounted, the *onus* of showing that they were given at the real value, so that there should be no loss on a resale, lies on the plaintiff suing on the bill; but where the party received the goods readily, it was held, that it might be presumed they were fairly charged.

Davis v. Hardacre, 2 Camp. 375; Coombe v. Miles, Ibid. 553.||

[An action was brought here upon a bond entered into at Calcutta, where both parties then resided, and the plaintiff still resided; but the defendant was in England; and nine *per cent.* was the rate of interest made payable by the condition of the bond. Lord Mansfield said, "The plaintiff is in justice entitled to recover the sum really lent to the defendant, together with Indian interest till the signing of the judgment; but

with only legal interest of this country (which is no more than five *per cent.*) from the time of the liquidation of the debt by the judgment."

Bodily v. Bellamy, 2 Burr. 1094; {4 Johns. Rep. 183, Foden v. Sharp.} ‖See Harvey v. Archbold, 3 Barn. & C. 629; Thompson v. Powles, 2 Sim. 194.‖

A special memorandum was endorsed on a bond given for the payment of 100*l.* with interest at 5*l. per cent.* in payments of 20*l.* yearly by quarterly payments of 5*l.* each. The endorsement was to this effect: that at the end of each year the year's interest due was to be added to the principal sum; and then the 20*l.* received during the year to be deducted, and the balance to continue as principal. As the intention of the parties did not appear to be usurious; as not the interest on the whole 100*l.*, but the interest due, was to be added to the principal at the end of the year, and the interest due could only be taken to mean what was legally due; as there was no loan, but the consideration of the bond was the giving up of an annuity; the court of K. B. *dissent.* Kenyon, C. J., held, that the contract was not usurious, and that opinion was afterwards affirmed in the Exchequer-chamber.

Le Grange v. Hamilton, 4 Term R. 613; 2 H. Black. 142, S. C. in error.

‖Where bonds for the amount of purchase-money of property were given, payable by instalments, which instalments were composed of principal and interest, it was contended, as the bonds themselves necessarily carried interest, this was interest upon interest, and usury; but the Lord Chancellor held, that as the obligee on each instalment becoming due might have had judgment for the principal and interest due on the bonds, there was no usury.

Tarleton v. Backhouse, Coop. C. C. 231.

And though an *antecedent* contract for a loan for twelve months, to settle the balance at the end of six months, and the interest to carry interest for the subsequent six months, is illegal, yet an agreement at the end of the six months to settle accounts, and the balance to carry interest for the next six months, is good.

Ex parte Bevan, 9 Ves. 223; Eaton v. Bell, 5 Barn. & A. 40; and see 3 Camp. 467.‖

{Taking a premium exceeding the legal rate of interest for anticipating payment of a debt is not usury; there being no loan or forbearance.

4 East, 55, Barclay v. Walmsley; 5 Esp. Rep. 11, S. C.

A fair purchase of a bond or note at any discount is not usury.

1 Dall. 217, Musgrove v. Gibbs; 2 Dall. 92, Wycoff v. Longhead; 2 Hen. & Mun. 14, Kenner v. Hord; *post*, p. 299, 300.

If A lend money to B, who puts it out at usurious interest, and agrees to pay to A the same rate of interest which he is receiving upon A's money, this is usury between A and B, and an endorser of B's note to A may avail himself of the plea of usury.

3 Cran. 180, Levy v. Gadsby.

It is not usurious, upon a settlement of accounts, to take a bond or note for the balance due, including interest, and to receive interest on such bond or note.

1 Hen. & Mun. 4, Brown v. Brent. Vide as to compound interest, 2 Ves. J. 15, Morgan v. Mather; 9 Ves. J. 223, Ex parte Bevan; Ibid. 271, Chambers v. Goldwin; 11 Ves. J. 92, Raphael v. Bœhm; 12 Ves. J. 127, Dornford v. Dornford; 1 Binn. 152, 159, 165, Sparks v. Garrigues; 2 Mass. T. Rep. 284, Tucker v. Randall; Ibid. 568, Greenleaf v. Kellogg; 3 Mass. T. Rep. 221, Cooley v. Rose.}

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β When a certain gain is reserved to the lender, besides the interest, the contract is usurious.

Philip v. Kirkpatrick, Add. 126.

But a reasonable commission beyond legal interest, for extra incidental charges, as for agency in remitting bills for acceptance and payment, it seems, is not usurious.

Huling v. Drexell, 7 Watts, 126, 129.

A stipulation contained in a mortgage, that in default of payment of interest, &c., the mortgagee may sue out a *scire facias*, and recover in addition all costs, charges, and expenses of every kind which the plaintiff shall or may sustain on account of such default; held, that this does not render the contract usurious.

Huling v. Drexell, 7 Watts, 126.

In Pennsylvania, a transaction may be usurious when the price of land or other property is retained by a purchaser on condition of paying interest for its use, although the annual compensation may be denominated rent.

Evans v. Negley, 13 S. & R. 218.

The allowance of commission to the holder of certain notes, by the drawer, in case the notes shall not be paid when due, it seems, is usurious.

Large v. Passmore, 5 S. & R. 135.

A commission may be received on an advance or loan of credit by one person to another without liability under the usury law.

Gray v. Brackenridge, 2 Penns. 75; Hutchinson v. Hosmer, 2 Conn. 341; De Forest v. Strong, 8 Conn. 513; but see Steele v. Whipple, 21 Wend. 103.

A fair purchase of a bond or note may be made even at a discount of twenty or thirty *per centum*, without committing the offence of usury.

Musgrove v. Gibbs, 1 Dall. 216, 217; Wycoff v. Loughead, 2 Dall. 92; Raplee v. Morgan, 2 Scam. 563; Lloyd v. Keach, 2 Conn. 175; 1 J. J. Marsh. 497; 2 Munf. 36.

A bond was conditioned to pay a sum of money in seven years, and "the lawful interest thereon yearly and every year from the date;" there was an agreement endorsed on it by the obligor, that "if any part of the said interest shall remain unpaid for the space of three months, to allow the said obligee lawful interest for the same, from the end of the said three months until paid;" held, that the agreement was not usurious, and might be enforced.

Pawling v. Pawling, 4 Yeates, 220.

To constitute usury, there must be a borrowing and lending of money, by the plaintiff to the defendant, or the forbearance of a pre-existing debt.

Hancock v. Hodgson, 3 Scam. 333.

Where one borrowed money and agreed to pay interest for it annually, and did not do it, and some years afterwards the parties ascertained the amount then due with compound interest, and the borrower gave new notes for the amount thus ascertained; held, that this was not usury under the statute of Connecticut.

Fobes v. Cantfield, 3 Ohio, 17.

An agreement to pay five *per cent.* collection fees in addition to the legal rate of interest for money loaned, is, in Ohio, considered against public policy and void.

State of Ohio v. Taylor, 10 Ohio, 378; Shelton v. Gill, 11 Ohio, 417. See as to the rule in Pennsylvania, Huling v. Drexell, 7 Watts, 126.

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The Bank of Muskingum agreed with certain contractors on the public works, that the bank would loan money to the state, to be applied to the public works they are employed on, and charge the contractors five *per centum* commissions, is an illegal shift and device to obtain more than six *per cent.*, and such contract cannot be enforced by the bank; but if the contractors actually paid the five *per cent.* commissions, they cannot recover the money back, being *in pari delicto.*

Spalding v. Bank of Muskingum, 12 Ohio, 544.

A parol promise to pay more than lawful interest, made at the giving of a note, and to induce the lender of the money to take it, and which was part and parcel of the contract, renders the note usurious and void.

Atwood v. Whittlesey, 2 Root, 37.

Where a note is given for an antecedent debt, and it includes in the amount a fair and reasonable charge for the expenses of the creditor in securing the debt, it is not usury.

Camp v. Bates, 11 Conn. 487.

When the services of a slave, given for the use of money, exceed in value the highest rate of conventional interest, the contract is usurious.

Galloway v. Legan, 4 Mart. N. S. 167; Richardson's Adm'r v. Brown, 3 Bibb, 207

An agreement entered into in New York, and to be executed there, by which A and B exchange their notes, bearing interest at six *per centum*, and in consideration thereof, B engages to insure a certain number of lives with A, at the usual rates, and also to send his annual crop of sugar to A, to be sold on the usual commissions, is usurious and void by the laws of New York.

Clague et al. v. Their Creditors, 2 Lo. R. 115.

Where the lender and borrower agreed that the former should receive ten *per cent.* interest, *per annum*, on his advances to, and one-third of the profits in the mercantile firm of the latter, the contract was declared to be usurious.

Flower v. Millaudon, 6 Lo. Rep. 709.

To be tainted with usury, an obligation must, in its inception, be based upon a loan of money above the legal rate of interest.

Norwood v. Waddell, 11 Lo. R. 493; Tardeveau v. Smith's Ex'r, Hardin, 175; M'Ginnis v. Hart, 4 Bibb, 327; Knox v. Black, 1 Marsh. 298; Price v. Campbell, 2 Call. 110.

A loan of money and an obligation taken by the lender from the borrower, to deliver slaves of a certain description in a certain time, worth more than the money and legal interest, held to be usurious.

Lindley v. Sharp, 7 Monr. 248.

A was indebted to B for a certain sum; on the day of payment, A agreed to give B more than six *per cent.* for indulgence; a bond was then given for the principal sum, and the amount beyond the legal interest was settled partly in money and partly in a note. On an action on this bond, it was held that the transaction was usurious.

Glisson v. Newton's Ex'rs, 1 Hayw. 336. See Conf. Rep. 28.

A, a resident of North Carolina, being in New York, contracted a debt there with B, who lived at the latter place; afterwards A paid to the agent of B, in North Carolina, a part of the debt, and credit was given him four months for the balance, with interest at the New York rate, seven *per cent.*,

and a bond given for the debt and interest. Held, that this bond was not contrary to the usury laws of North Carolina.

M'Queen v. Burns, 1 Hawks, 476.

Whenever by the terms of the contract, the debtor can avoid the payment of a larger sum, by the payment of a smaller at an earlier day, the contract is not usurious but conditional, and the larger sum is considered as a penalty.

Moore v. Hylton, 1 Dev. Eq. 429; Winslow v. Dawson, 1 Wash. 118.

When a security is usurious in its creation, it is void in the hands of an innocent holder. But if valid in its inception, a subsequent usurious agreement does not invalidate it.

Collier v. Nevill, 3 Dev. 30; Wilkie v. Roosevelt, 3 Johns. Cas. 206; Munn v. The Commission Company, 15 Johns. 44; Bennet v. Smith, 15 Johns. 355.

A note is executed for $607, payable in certain bank-notes; it is afterwards agreed to extend the time of payment, and a note is executed for $607 payable in specie; the bank-notes were then worth only $456. Held, that this is usury.

Lawrence v. Morrison, 1 Yerg. 444.

Where there was a tacit understanding between a borrower and lender, founded on a known practice of the latter, to lend money at legal interest, if the borrower purchase of him a horse, at an unreasonable price; this is a shift to evade the statute against usury.

Douglass v. M'Chesney, 2 Rand. 109.

When an article of fluctuating value is sold, and is to be repaid in kind, with more than the legal rate of interest for forbearance on the price at the time of sale, the transaction is usurious.

Hamblin v. Fitch, Kirb. R. 260; 5 Cowen, 149, n. a.

A mortgage taken for a sum of money lent, including a former usurious loan, is void.

Jackson v. Packard, 6 Wend. 416.

Where interest is calculated and received upon a note, upon the principle of three hundred and sixty days in a year, it is usurious.

Utica Insurance Company v. Tilliman, 1 Wend. 555. See New York Firemen Insurance Company v. Ely, 2 Cowen, 678.

A contract by which one lets a certain number of sheep, and the other agrees on a year's notice to return the same number, the same quality and the same age as those received, and in the mean time to pay annually fifty cents per head for the sheep, although the value of each sheep is less than a principal sum, the interest of which at seven *per centum per annum* would amount to fifty cents, is not usurious.

Hall v. Haggart, 17 Wend. 280.

The Farmers and Mechanics' Bank of Georgetown discounted the notes of A, payable in thirty days, and instead of money, paid A the proceeds of the notes in post-notes, that is, bank-notes payable at a future day, without interest, such post-notes being then at one and half of one *per cent.* discount in the market. Such a contract is usurious.

Gaither v. The Farmers and Mechanics' Bank of Georgetown, 1 Peters, 43. See Bank of the United States v. Owens, 2 Pet. 257; Bank of the United States v. Waggener, 9 Peters, 378· Northampton Bank v. Allen, 10 Mass. 284; State Bank v. Ayers, 2 Halst. 130.

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Taking interest in advance, upon the discount of a note in the usual course of business by a banker, is not usury.

Thornton v. The Bank of Washington, 3 Peters, 40. See Renner v. The Bank of Columbia, 9 Wheat. 581; Fletcher v. The Bank of the United States, 8 Wheat. 338.

The requisites to form a usurious transaction, are, 1, a loan of money, either express or implied; 2, an understanding that the money lent shall be returned; 3, that a greater interest than that allowed by the statute shall be paid. There must also be an intent to violate the law.

Lloyd v. Scott, 4 Peters, 205.

When a security for the payment of money is in its inception uncontaminated with usury, it is not rendered usurious by an *ex post facto* agreement for a greater sum than the statute allows for a forbearance.

Bush v. Livingston, 2 Caines' C. C. in Err. 66; Pollard v. Baylors, 6 Munf. 433; Thompson v. Woodbridge, 8 Mass. 256.

Where a note is given for an antecedent debt, it is not usurious to include the creditor's reasonable expenses incurred in obtaining the note.

Kent v. Philps, 2 Day's Cas. 483.

Where a judgment creditor agreed with his debtor that the sale should be postponed eighteen days, in consideration that the latter would pay him a certain sum more than the legal interest; it was holden that this agreement was usurious under the statute.

Carter v. Brand, Cam. & N. 28.

A premium for delay of payment, although secured by a separate instrument, makes the contract usurious.

Glisson v. Newton, 1 Hayw. 336.

A sale of stock made to a man in necessitous circumstances, at a price much above the market price, is to be considered as a covered loan at usurious interest.

Anon., 2 Desaus. 333.

An agreement to take more than legal interest for a loan of money, is usurious, though no unlawful interest be taken.

Clark v. Bageley, 3 Halst. 233.

A security for the loan of money, upon which usurious interest has been received, is not void by the statute of usury, unless usurious interest were reserved by the original contract.

Gardner v. Flagg, 8 Mass. 101; Thompson v. Woodbridge, 8 Mass. 256.

If a banking company at one place, take notes payable in the bank-notes of a bank located at another place, and, upon the renewal of such notes, take a premium equal to the difference between that and other money, it is not usurious.

Portland Bank v. Storer, 7 Mass. 433.

Where money was loaned and secured by a transfer of stock, and it was a condition of the loan that the lender should have the option, either to retain the stock and dividends, at the market value of the stock at the time the loan was made, or to receive back his money with interest, at the time appointed for its payment; held, that this rendered the contract usurious.

Cleaveland v. Loder, 7 Paige, 557.

When judgment has been rendered in an action brought on a usurious contract, it cannot be avoided for that cause; nor can a new contract, en-

(D) What Hazard will bring an Agreement out of the Statute.

tered into between the parties to secure the payment of such judgment, be avoided as usurious.

Bearce v. Barstow, 9 Mass. 45; Thatcher v. Gammon, 12 Mass. 268.

If a debtor, in consideration that the mortgagee will make a mortgage payable at the residence of the mortgagor, instead of the place of residence of the mortgagee, agrees to allow him the difference of exchange between the two places, the mortgage is not, for this reason, usurious, unless this contrivance has been adopted to evade the statute.

Williams v. Houce, 7 Paige, 581.ℊ

(D) What kind of Hazard or Casualty will bring an Agreement, &c., out of the Statute of Usury.

It has been held, that if principal and interest be in hazard upon a contingency, it is no usury, *though the interest* do exceed the allowed rates *per cent.* And when there is a *hazard that the plaintiff may have less than his principal*, it is no usury.

Show. 8, Mastin v. Abdee.

Thus, if S lend 100*l.* to have 120*l.* at the year's end upon casualty, if the *casualty goes to the interest only, and not to the principal*, it is usury; for the party is sure to have the principal again, come what will: but if the *interest and principal are both in hazard*, it is not then usury. *Per* Dodderidge, J.

Cro. Ja. 507, pl. 20, Roberts v. Trenayne; ‖ S. C. *nom.* Roberts v. Tremoile, 2 Roll. R. 47; and see Wortley v. Pit, 1 Ves. 164;‖ {Addis. 125, Phillip v. Kirkpatrick.}

ß In Kentucky, A B loaned to C D $37 50 in specie, when the paper of the Bank of the Commonwealth was at a depreciation of two for one, for which C D executed his note for $90 payable in the paper of the Bank of the Commonwealth, in one year after the date. Held, that this was not usurious, because A B risked the prospective value of the paper.

Wilson v. Kilburn, 1 J. J. Marsh. 596. See Talbot v. Warfield, 3 J. J. Marsh. 84.ℊ

In debt upon an obligation of 50*l.* the defendant pleaded the statute, and *showed that it was agreed* between the plaintiff and defendant, 14*th December, that the plaintiff should lend* the defendant 30*l. to be repaid the first of June following, and* the plaintiff *should have* 3*l. for the forbearance, if the plaintiff's son should be then living: and if he died, then to pay but* 26*l. of the principal* money. The court inclined that it was within the statute of usury, whereupon the plaintiff, who had demurred, became nonsuit.

Moor, 397, pl. 528, Reynolds v. Clayton. All the court held, upon the two statutes of 37 H. 8, and 13 Eliz., that the bond was void, because it appears to be made by corrupt means to have more than 10*l. per cent.*, which the statute of 37 H. 8 intended to punish. And by the *proviso* it appears that the intent was, *if one was indebted* to another, *truly without loan and intention of usury*, then in such case *bonds and conveyances of land for securing the true debt, are out of the said statute;* but if there is a borrowing of money, and a communication for interest, the device to be beyond the rate of 10*l. per cent.* is fraudulent and within the said statute, otherwise the statute would be vain; for he might as well have made the condition, that if twenty persons, or any of them, should be living at the day, &c., then he should have 33*l.* And of this opinion were Popham, C. J., of B. R., and Periam, Ch. B. 2 And. 15, pl. 8, S. C.; 5 Rep. 70, Clayton's case, S. C., resolved that it was a usurious contract.

So, where A agreed with J S to give him 10*l.* for the forbearance of 20*l.* for a year, *if B his son were then alive;* it was held by three justices

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(Glanvil *absente*) to be usury, by reason of the corrupt agreement, and it is the intent makes it so or not so.

Cro. Eliz. 642, pl. 43, C. B., Button v. Downham. ‖See Lamego v. Gould, Burr. 715.‖

Likewise, where the obligor was bound in a *bond* of 300*l.* conditioned *to pay* 22*l.* 10*s.* premium *at the end of the first three months* after the date, &c., *and* 6*d. in the pound at the end of six months*, as a further premium, *together with the principal* itself, *in case the obligor be then living; but if he dies within that time*, then *the principal to be lost;* this was adjudged a usurious contract, because there was a *possibility* that the obligor might live so long; *and* there is *an express provision to have the principal again.*

3 Salk. 390, pl. 3, Mason v. Abdy; Comb. 125, S. C.

But, where the bargain is merely casual, and the whole depends on a contingency, there the contract is not usurious. Thus—

Mr. Spencer being in possession of an estate of 7000*l.* a year, and of a personal estate in goods and plate, &c., worth 20,000*l.*, and owing about 20,000*l.* to tradesmen, being about thirty years of age, of a hale constitution, but impaired by irregularity, and the Duchess of Marlborough, his grandmother, being then seventy-eight, and of a good constitution, made the defendant a proposal, that for 5000*l.* paid down, he would engage to pay 10,000*l.* if he survived the duchess, which after some deliberation was accepted by the defendant; and Mr. Spencer gave him a bond for the payment of 10,000*l.* in six months after the death of the duchess, in case he should be then living. The duchess lived six years after, and then died, giving Mr. Spencer by her will a very considerable estate. Then Mr. Spencer confessed a judgment to the defendant for 10,000*l.*, and afterwards paid him 2000*l.* in part of it, and then died, about a year and eight months after the duchess. A bill was brought to be relieved against this demand, upon payment of the principal sum with legal interest, on account of its being an unconscionable bargain, and against the public good.

Earl of Chesterfield et al., Executors of Mr. John Spencer, v. Sir Abraham Jansen, MS. Rep. in Chanc. Trin. 24 G. 2; and see the case very fully reported in 1 Atk. 301; [2 Ves. 125, S. C.; 1 Wils. 286, S. C.;] {5 Ves. J. 27, Wharton v. May, S. P.} ‖A *post obit* bond, though a questionable security, seems not usurious. 1 Anst. 7; 1 H. Black. 94; 5 Ves. 27.‖

Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Justice Willes, Sir John Strange, Master of the Rolls, and Mr. Justice Burnet; who gave their opinions in Hil. term, 1750, that no contract can be fraudulent within the statute, where it is not for the forbearance. There may be many contracts which this court sets aside, though not usurious, as marriage-brokage bonds, place-brokage bonds, &c., but here appears no fraud or imposition in this case, and the party himself has confirmed it: This was a mere contingency, and the whole money might have been lost: it is a bargain of chance, and a mere wager; and the relief prayed by the plaintiffs was refused.

So, where A delivered to B 100*l.*, who by indenture covenanted with A *to pay to every one of A's children which then were and should be living, at ten years' end*, 80*l.*, A having then five daughters; and for assurance mortgaged a manor, and was bound in a statute of 500*l.*; it was adjudged not to be usury, but a mere *casual bargain.* But if it had been to pay 400*l.* at ten years' end, *if any were living*, then it had been a greater

doubt; or, if it had been to pay 300*l.* if any were living at one or two years' end, that had been usury, because of the *probability* that one of them would continue alive for so short a time; but in ten years are many alterations.

Cro. Eliz. 741, pl. 15, Bedingfield v. Ashley.

But, where M lent C 150*l.*, for repayment of which C *leased a close to M for sixty years, to begin at the end of two years*, upon condition that *if he paid the* 150*l. at the end of the two years, the lease to be void;* and it was agreed that, for the deferring and giving a day of payment for the two years, *C should pay to M for interest* 22*l.* 10*s. quarterly, if M should so long live;* in pursuance of which agreement M lent the 150*l.* and A made the lease, and granted by fine to M the rent of 22*l.* 10*s.*, to be paid quarterly, if M should so long live; this was held to be a usurious contract, for by intendment M might have lived above the two years, and it was an *apparent possibility*, that he should receive that consideration, whereby she is within the statute; and also that *the lease* taken *for the payment of the principal money, and not for any part of the usury, is within the statute*, because it is for security of money lent upon interest, and for the securing of that which the statute intended M. should lose.

Cro. Ja. 507, pl. 20, Roberts v. Trenayne; ‖S. C. *nom.* Roberts v. Tremoile, 2 Roll. R. 47.‖

‖ A *bonâ fide* contract for an annuity for *life* or *lives* is clearly exempted from the operation of the statute of usury, and this, although the annuity is made redeemable at the option of the grantor, for the grantee runs a hazard of never receiving back an equivalent for his principal.

Fountain v. Grimes, Cro. Ja. 252; Rex v. Drury, 2 Lev. 7; Murray v. Harding, Black. R. 859; 3 Wils. 390; Richards v. Brown, Cowp. 770; and see 1 Atk. 340, 3 Atk. 280.

And a covenant by the grantor to insure the life on which the annuity depends, and to assign the policy to the grantee, seems not to render the contract usurious.

In re Naish, 7 Bing. 150.

An annuity for a term of years certain, which will repay to the grantee the amount of his purchase-money, and more than 5*l. per cent.* interest, is usurious; for the principal in such case is not in hazard, as in the case of an annuity for life.

Fereday v. Wightwick, 1 Russ. & M. 45; and see 3 Barn. & A. 666.‖

(E) In what Cases Securities shall be forfeited or avoided on account of Usury.

HERE it is to be premised, that it is not material whether the payment both of the principal and also of the usurious interest be *secured by the same or by different conveyances*, but all writings whatsoever for the strengthening of such a contract are void.

Hawk. P. C. c. 82, § 21; ‖3 Barn. & C. 273.‖ {In Pennsylvania, the security is not void, but the plaintiff may recover the just principal with lawful interest. 2 Dall. 92, Wycoff v. Longhead.}

Where a bond is made *for more than legal interest, but* at the payment the *obligee takes only legal interest;* he shall not be punished for the contract; but perhaps the bond shall be void.

2 Le. 39, *arg.* in Van Henbeck's case.

Thus—where *A borrowed of B* 80*l.*, *and was bound in a bond to pay*

(E) In what Cases Securities shall be avoided.

him 90*l. at the end of the year; per cur.*—Though the 90*l. was tendered, and B did tell the same, yet if B takes but* 80*l. it is* not usury within 5 Eliz. to make a treble forfeiture; but yet in that case the obligation itself is void. The *bond* is void presently, and if he receives excessive interest, he shall *forfeit the treble value. Per* Clerk, J.

4 Le. 43, pl. 117, Brown v. Fulsby; 3 Le. 205, pl. 260, Body v. Tassel.

β Where a partial payment was made on account of a note, for a sum of money borrowed on usurious interest; held that the usury was complete.

Musgrove v. Gibbs, 1 Dall. 216; Wycoff v. Longhead, 2 Dall. 92; Turner v. Calvert, 12 S. & R. 46.

In New York, where there is a usurious agreement upon the loan of money, it is immaterial whether the unlawful excess be actually paid, or only promised to be paid; in either case the contract is void.

Hammond v. Hopping, 13 Wend. 505. γ

‖ And on the other hand, if usurious interest is not contracted for, the bond will not be rendered void, although it may in fact be taken. In order to constitute usury, so as to make the assurance void, and also to subject the party to penalties, there must be both an usurious contract, and a usurious taking in pursuance of it, of money or money's worth.

Scott v. Brest, 2 Term R. 241; Barbe *q. t.* v. Parker, 1 H. Bl. 283; Ex parte Jennings, 1 Madd. R. 331; and see 1 Saund. 295, note 1. ‖

Where the first contract is not usurious, it shall never be made so by *matter ex post facto. Per* Williams, J.

Bulstr. 17.

Thus—in debt upon an obligation, where the statute of usury was pleaded, it was said by Popham upon the evidence, that if a man *lends* 100*l. for a year to have* 10*l. for the use* of it, if the *obligor pays the* 10*l. twenty days before it be due*, that does not make the obligation void, because it was not corrupt. But *if*, upon making the obligation *it had been agreed that the* 10*l. should have been paid within the time*, that would have been usury, because he had not the 100*l.* for the whole year, when the 10*l.* was to be paid within the year; and a verdict was given accordingly.

Noy, 171, Dalton's case, S. P., and resolved by the whole court that the taking the use-money within the year shall not avoid the obligation, and is not usury within the statute, because it was not usurious at the beginning. And judgment for the plaintiff. Bulstr. 17.

Likewise, if a man *makes a usurious contract* with another, and gives him unlawful interest, *and agrees to give* him *a bond for the principal, and after*, by a subsequent agreement, *gives a bond for the sum lent to J S, to whom the lender owes so much*, in satisfaction of his debt; this bond is not voidable by the statute. *Per* Holt, C. J.

7 Mod. 119, The Queen v. Sewel, *alias* Beaus.

So, if a man *lend money on a legal interest, and after a subsequent agreement be made* for more interest, which is usury; that will not avoid the first contract. *Per* Holt, C. J.

Far. 119, The Queen v. Sewel, *alias* Beaus. For the words of the statute are, "That all assurances for the payment of any principal, &c., *whereupon* or *whereby* there shall be reserved or taken above the rate of 5*l.* in the hundred, shall be void." {1 H. Bl. 462, Gray v. Fowler, S. P.}

{L gave a bond and mortgage to E, who, after the day of payment, demanded the money, $6222 being then due for principal and interest. L agreed with him to pay $5600 in cash, and give his notes for the residue;

and then applied to B to advance the $5600 to E, agreeing to repay it in 90 days, with a premium of $400, the whole to be secured by an assignment from E of the bond and mortgage. This arrangement was accordingly made. On a bill by B against L to foreclose, it was held that the mortgage, having been originally given on a good and *bonâ fide* consideration, could not be impeached on account of the subsequent usurious contract between B and L, but that B was not entitled to more than the sum actually paid with legal interest.

2 Cain. Er. 66, Bush v. Livingston.}

But, if a second bond be made after the forfeiture of a former, and conditioned for the receipt of interest according to the penalty of the forfeited bond, this is as much within the statute, as if it had been made before the forfeiture; for if such a practice should be allowed, nothing could be more easy than to elude the statute; and though the whole penalty be due in strictness to the obligee, yet the true principal debt is in conscience no greater after the forfeiture of the bond than it was before.

Hawk. P. C. c. 82, § 23.

‖ Where the grantor of an annuity, being desirous to redeem it, agreed with the grantee to discount for him a bill of exchange for the purpose of producing the money, and the grantor accordingly drew a bill for 5000*l.* payable at three years, and it was discounted as follows: The grantee took 4083*l.* 6*s.* 8*d.* as the amount of the purchase-money and arrears of the annuity, and paid 116*l.* 13*s.* 4*d.* to the grantor, and retained 750*l.* as the discount for three years on 5000*l.*, and then immediately the bill was given up and a bond signed by the grantor and two others to the grantee, payable in three years, for the sum of 5000*l.*; it was held, that this could not be considered as a fair transaction of ordinary discount, nor as a *bonâ fide* purchase of the annuity, but that it was a usurious transaction; and this, although the jury declared they did not believe the grantee thought he was acting contrary to law.

Marsh v. Martindale, 3 Bos. & Pul. 154.‖

A bond made to secure a just debt payable with lawful interest, shall not be avoided by reason of a corrupt agreement between the obligors, to which the obligee was no way privy: as, where A, being indebted to B in 100*l.*, agrees to give him 30*l.* for the forbearance of that 100*l.* for a year, and gives him a bond for 60*l.* for payment of the 30*l.*, and for the payment of the 100*l.* enters into a bond of 200*l.* together with B for the payment of a true debt of 100*l.* due from B to C.

Hawk. P. C. c. 28, § 11.

So, where W was *indebted* in 100*l.* *to A upon a usurious contract on a bond*, and *A being indebted to E, transferred the debt to E*, and *W became bound for the same usurious debt to E, whose debt was just, and he ignorant of the usury;* it was adjudged, upon great deliberation, that the obligation made by W to E was not avoidable for the usurious contract made between W and A, because it was given to E for a true debt, and he knew nothing of the usury, though the ground between A and W was usurious.

Moor, 752, pl. 1035, Ellis v. Warnes.

Likewise, an assurance made in pursuance of a fair agreement for such interest as is allowed by the statute, shall not be avoided by the fault of

the scrivener, who draws it up in such a manner as to bring it within the express letter of the statute: As, where the parties agree, that 5*l.* shall be paid for the loan of 100*l.* for one year, and the scrivener, in drawing the bond for it, doth without the knowledge of the parties, who are illiterate persons, make the 5*l.* payable at the end of half a year: or, where, on the fair loan of 100*l.* agreed to be paid with common interest, a mortgage is made for the 100*l.* with a proviso, that it shall be void on payment of 105*l.* at the end of one year, without any covenant for the mortgagor to take the profits till default be made of payment, so that in strictness the mortgagee is entitled both to the interest and profits.

Hawk. P. C. c. 82, § 17; [Murray v. Harding, *supra*, 287.] ‖See Glasford v. Laing, 1 Camp. 148.‖

It is to be observed, that a fine levied, or judgment suffered, in pursuance of a usurious contract, may be avoided by an averment of the corrupt agreement, as well as any common specialty, or parol contract. And in an *assumpsit* if it appear, either upon the evidence, or from the plaintiff's own express showing in his declaration, that the contract was usurious, he cannot recover. But a specialty cannot be avoided by usury appearing on evidence or on the face of the condition, but it must be pleaded.

Hawk. P. C. c. 82, § 20. {But a note which is originally fair cannot be impeached in the hands of an innocent holder on account of a subsequent usurious transfer. 1 Bay. 486, Foltz v. Mey; 1 East, 92, Parr v. Eliason; 3 Esp. Rep. 210, S. C. And if a note given by A, for an usurious consideration be endorsed to C, for a valuable consideration, without notice of the usury, and afterwards A gives to C a new security for the amount, such new security is good. 8 Term. 390, Cuthbert v. Haley; 3 Esp. Rep. 22, S. C.; 2 Cain. 150, Stewart v. Eden. Vide Ellis v. Warnes, *supra*, p. 289, and 4 Esp. Rep. 11, Turner v. Hulme.}

If a judgment be given upon a usurious contract, and it be *part of the agreement to have a judgment*, yet the defendant may avoid such judgment by *audita querela*, or by *scire facias* brought on the same.

Vin. Abr. tit. Usury, 304.

Where A *mortgaged to B*, on a usurious contract for 100*l.*, and before the day of payment B *is ousted by C*, and B brings an action against C, C cannot plead the statute of usury; for he has *no title*, the estate being void against the mortgagor. *Per* Periam.

Le. 307, p. 427, Carter v. Claycole.

But, where A lent B 45*l.* *on a pledge of jewels*, and it was agreed to pay 9*l.* for it for a year; *afterwards B gave a bond* for the same money; *per* Holt, *at Nisi Prius*, It is a question if the bond be void or not.

7 Mod. 119, The Queen v. Sewel, *alias* Beaus.

[A bill of exchange given on usurious consideration is void in the hands of an innocent endorsee for valuable consideration without notice of the usury.

Lowe v. Waller, Dougl. 736.]

{An absolute deed of conveyance of real estate, upon trust to sell and pay certain debts, cannot be avoided on the ground that the debts to be paid are usurious.

1 Johns. Ca. 158, Denn v. Dodds.}

‖ And even though the bill were lawful in its original inception, it has

been held, that an innocent holder cannot recover upon it if he has to make title through an endorsement vitiated by usury.

Lowes v. Mazarredo, 1 Stark. Ca. 385; *sed* vide Parr v. Eliason, 1 East, 92.

And where an innocent holder being in possession of a bill vitiated by usury, on being informed of it took a fresh bill in lieu of it, drawn by one of the parties to the original usury, and accepted by a third person for the accommodation of the other party, it was held, that he could not recover on the substituted bill.

Chapman v. Black, 2 Barn. & A. 588; and see 8 Term R. 390.

However, the mere receiving an exorbitant sum by an agent for getting a bill discounted for the acceptor, the agent himself being no party to the bill, will not affect the bill in the hands of the *bonâ fide* holder, who only receives the legal discount; and such holder may consequently sue the acceptor, since there is here no usurious loan of money by the party discounting the bill. If the agent receiving the commission had himself advanced the money, it would have been otherwise.

Dagnall v. Wigley, 11 East, 43.

But now by the 58 G. 3, c. 93, it is enacted, that no bill of exchange or promissory note, although it may have been given for a usurious consideration or upon a usurious contract, shall be void in the hands of an endorsee for valuable consideration, unless such endorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract.

When usurious securities are destroyed by mutual consent, a subsequent agreement by the borrower to pay the lender the amount due for legal principal and interest is founded on sufficient consideration, and binding.

Barnes v. Hedley, 2 Taunt. 184; 1 Camp. 165, *notâ; sed* vide Forrest, 72; 1 Camp. 157; and see 1 H. Black. 462.

But if the security extends to the usurious interest it is not valid.

Preston v. Jackson, 2 Stark. 237; Wicks v. Gogerly, 1 Ryan & Moo. 123.

In one case the Court of C. B. refused to set aside a judgment and execution for usury, unless the defendant paid the legal principal and interest.

Hindle v. O'Brien, 1 Taunt. 413; and see 1 Bos. & Pul. 270.

But the Court of K. B. have expressed their dissatisfaction at this decision, and, in setting aside a judgment founded on a usurious warrant of attorney, refused to impose the terms of payment of the legal debt.

Roberts v. Goff, 4 Barn. & Ald. 92.

Where securities are given partly for a legal and partly for a usurious debt, the usury taints the whole security, and the holder cannot recover on it for any part of the amount.(*a*)

Harrison v. Hannel, 5 Taunt. 780; 1 Marsh, 349. (*a*) The *security* in such case is void; but the *bonâ fide* debt is not extinguished by being mixed up in a security with a usurious debt. Gray v. Fowler, 1 H. Black. 462; Phillips v. Cockayne, 3 Camp. 119; and see the stat. 58 G. 3, c. 93.

Where the drawer of bills payable to his own order and accepted, hands them over endorsed to a friend, in order to get them discounted, and he does so by allowing usurious interest to the discounter, and the bills come into the hands of the Crown under an extent against the discounter, the Crown cannot recover on the bills against the acceptor; for the transac-

(F) In what Cases Penalties shall be incurred.

tion is in substance a usurious advance of money by the discounter to the drawer, through his friend, and the bill in the hands of the Crown is in the same situation as in those of the discounter.

The King v. Ridge, 4 Price, 50. The statute would make no difference in this case.‖

(F) In what Cases a Forfeiture of treble Value shall be incurred on account of Usury.

THOUGH the receipt of higher interest than is allowed by the statute, by virtue of an agreement subsequent to the first contract, does not avoid an assurance fairly made and agreeable to the statute, yet it subjects the party to the forfeiture of treble value.

Hawk. P. C. c. 82, § 12.

But the receipt of interest before the time when it is in strictness due, being voluntarily paid by the debtor for the greater convenience of the creditor, or for any other such like consideration, without any manner of corrupt practice, or any previous agreement of this kind at the making of the first contract, does not make the party liable to the forfeiture of the treble value.

Hawk. P. C. c. 82, § 14.

An information upon the statute 12 Car. 2, c. 13, set forth that the *defendant*, 16 *November*, 20 *Car.* 2, *lent J S* 20*l.* till *June next following, and that afterwards*, (*viz.*,) *ad finem termini prædict.* he *took* of the said J S, *corrupté et extorsivè*, 30*s. for the loan* thereof, which is more than the statute allows. The jury found against the defendant. And it was moved, that this corrupt agreement ought to be within the statute at the making of the contract, and not at the end of the term, as laid in the information. Twisden, J., took a difference upon the two *clauses in the statute*, that if the *lender contracts for more*, so that the agreement is corrupt at the time of the loan, all the *assurance is void; but, if he contracts for no more* than the statute allows, *but will afterwards take more*, the *assurance shall not be avoided, but the party shall forfeit the treble value.* But judgment was stayed till the other side moved, because the court would advise.

Raym. 196, The King v. Allen.

In debt upon bond the defendant pleaded, that *after the making of the bond the defendant corruptivè receipt* so much, viz., more than the statute allows, and that therefore the bond was void. But adjudged upon demurrer, that the plea is not good; for *the bond* here was not for the payment of money (upon or for usury), as the words of the statute are; but *for any thing appearing to the contrary*, it *was for payment of a just debt, and so* the bond was *good when* it was *made;* and therefore a usurious contract after cannot make it void; but it is a forfeiture of the treble value by the latter clause of the statute.

Saund. 294, Ferral v. Shaen. ‖ See 4 Burr. 2253; Cowp. 114; Dougl. 237; 3 Wils. 261; 2 Black. 792; 3 Term R. 538;‖ 3 Salk. 390, pl. 4, S. P. accordingly.

A (when money was at 8*l. per cent.*) lends money and takes bond for the same, and then the statute 12 Car. 2 is made, and he will *continue the interest on that bond:* the bond shall not be avoided by such acceptance of interest, but the party shall forfeit the *treble value* by the statute. *Per* Twisden, J.

Raym. 197, The King v. Allen.

So, in debt on an obligation conditioned to pay by a certain day, the defendant *pleaded the statute* 12 *Car.* 2, *c.* 13, *and said that the contract was*

(G) In what Cases Relief is given against usurious Contracts.

usurious: but *per cur.* the contract being *made after the bond forfeited to receive interest according to the penalty*, which was double the principal, it doth not avoid the obligation that was good at first, but only subjects the taker to other penalties; and judgment for the plaintiff, *nisi.*

3 Keb. 142, pl. 13, Radly v. Manning.

‖ On the other hand, if a man contract for more interest than the statute allows, and afterwards take only legal interest, the contract is void, but the penalty is not incurred.

Fisher v. Beasley, Doug. 236; 1 W. Saund. 295 a, *notâ.*

As the penalty, therefore, is not incurred till more than legal interest has been *actually taken*, the time for bringing the action (one year from the offence by 31 Eliz. c. 5, s. 5) begins from the receipt of the usurious interest, and not from the making of the contract.

Fisher v. Beasley, Doug. 236; 1 W. Saund. 295 a, *notâ.*

Where a premium is actually paid at the time of the contract, and 5*l. per cent.* interest is agreed to be paid, the offence is complete on receipt of any part of that interest.

Wade v. Wilson, 1 East, 195; and see 2 Bos. & Pul. 381.

The mere taking a note for the money lent with usurious interest does not complete the usury, till the note is paid.

Maddock v. Hammett, 7 Term R. 184; and see 1 Camp. 445; 2 Camp. 53; 3 Barn. & C. 165.‖

β The offence of usury is complete when any thing above the legal rate of interest has been received for the forbearance.

Seawell v. Shomberger, 2 Murph. 200. See Fugate v. Ferguson, 1 Blackf. 366; Breckenridge v. Churchill, 3 J. J. Marsh. 16.

A return by the sheriff of satisfaction to an execution issued on a judgment for a debt infected with usury, is not sufficient evidence of the receipt of usurious interest, to charge the lender in an action for a penalty.

Wright v. M'Gibbons, 2 Dev. & Bat. 474.g

(G) In what Cases Relief is given against usurious Contracts.

It has been said, that though the statute does not go so far as to make the party receiving the usurious interest liable to refund; yet having prohibited the taking beyond such a sum, and avoided the contract, the taking it is a breach of the statute; and the actual receipt of the money will (in a court of equity) make him liable to refund; the wrong being the same, whether the usurious interest hath been actually paid or not.

Cas. temp. Talb. 114, Proof v. Hines.

Thus—where A entered into a *bond* to B for a sum of money, *to pay* 6*l. per cent.* interest; afterwards A being unable to pay off the bond, *consented to pay* 10*l. per cent.* for the money, *and continued paying at that rate for fourteen years:* B died, A *became a bankrupt;* and the assignees of A brought a bill; the *executors of B were decreed*, by the Master of the Rolls, *to account;* and that, for what had been really lent, legal interest should be computed and allowed, and what had been paid more should be deducted out of the principal to be due on the account; *and if B had received more than what was due with legal interest, the same to be refunded* by the executors, and the bond to be delivered up. And afterwards the Lord Chancellor affirmed the decree; but said he did not determine how it would be, had all the securities been delivered up; that not being before him.

Cas. temp. Talb. 38, Bosanquett v. Dashwood.

(G) In what Cases Relief is given against usurious Contracts.

The court decreed money to the plaintiff against the defendant; albeit he had judgment and execution, being upon the point of usurious contract.

Toth. 231, Langford v. Barnard.

A *woman resorted to gaming places at court; and by supplying persons of quality there with money, made great profit; for which purpose she borrowed much money, and gave the lender great rewards* from time to time; but *afterwards she borrowed more*, and being arrested for this last money, *gives bond and judgment* for it, and then brings a bill to be relieved against the security, and to have an allowance for the former excessive premiums which she had given, and to bring the defendant to an account. The defendant, by answer, confessed the receipt of five or ten guineas for the loan of ten guineas for a week or ten days; but *insisted that the sums so received were paid as profit*, and not towards satisfaction of the money lent. The court ordered the plaintiff to pay principal, interest, and costs at law, and here, or the bill to be dismissed with costs; for that it would not interpose or meddle with *play-debts*, or things of this kind. *Per* Lords Commissioners.

2 Vern. 170, pl. 156, Taylor et al. v. Bell; Bagnall et al., Ibid. 173. Ld. Hutchins said, that if the sureties had not been plaintiffs as well as the woman, he would not have relieved even against the penalty. Lord Chancellor, in the case of Bosanquett v. Dashwood, said, that as to the laws relating to gaming, the court would not interpose, because gamesters on both sides are equally guilty, and in such cases the court will stand neuter; but the borrower and lender are not in the view of gamesters. MS. Rep.

Upon a trust ||trial|| at Guildhall, in an *indebitatus assumpsit* for money received to the use of the plaintiff, the case was, The plaintiff was *co-obligor* with J S to the defendant, and between J S and the defendant there was a *usurious contract:* the *plaintiff paid part* of the money to the obligee, and after *pleaded the statute of usury* upon this bond; which is adjudged a usurious bond; he brought this action for the money, which he paid before the bond was proved usurious; and the question was, if the action lay; and Holt, C. J., seemed to incline strongly that it did not lie; for here there was a *payment actually made* by the plaintiff to the defendant, *in satisfaction* of this usurious contract; and if they will make such contracts, they ought to be punished; and he was not for encouraging such kinds of *indebitatus assumpsit;* for it is like to the cases of bribes, and he who receives them ought to be punished, but he who gives them ought not to be encouraged by any way to recover his money again.

Skin. 411, pl. 7, Tomkins v. Barnett; 1 Salk. 22, S. C., though said to be *coram* Treby, C. J., and that Treby, C. J., allowed, that where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, it is reasonable he should have his money again; but, where one knowingly pays money upon an illegal consideration, the party that receives it ought to be punished for his offence; and the party that pays it is *particeps criminis*. And there is no reason that he should have his money again; for he parted with it freely, and *volenti non fit injuria*. [See the observations on this case, *supra*, Vol. i.] ||tit. *Assumpsit*, (A); and see Cowp. 200; 1 Bro. C. R. 457; Doug. 696, overturning this case.|| [Notwithstanding what is here advanced, courts of law now view the borrower in a more favourable light, and will permit him to recover the excess of interest in an action for money had and received. Browning v. Morris, Cowp. 792. But to entitle him to bring such an action, he must show that he has done all that equity requires. In an action, therefore, to recover goods which the plaintiff had pawned, upon a usurious contract, the court held that he must show he had tendered all the money really advanced. Fitzroy v. Gwillim, 1 Term R. 153.] ||This case seems not law. Roberts v. Goff, 4 Barn. & A. 92; Tregoning v. Attenborough, 7 Bing. 97.||

(H) How far Sureties are affected by usurious Contracts.

It is said that defendant is not obliged to *discover* any usurious contract, unless the plaintiff offers to waive the penalty.

3 Vin. Abr. tit. *Usury*, 315, cites MS. Tab. tit. *Usury*, Jan. 24, 1424, Brand v. Cumming; [1 Atk. 450, Earl of Suffolk v. Green; 2 Atk. 393, Chauncy v. Tahourden.]

‖ The equitable jurisdiction in bankruptcy goes much further than courts either of law or equity. At law, you must make out the charge of usury; and in equity, you cannot come for relief without offering to pay what is legally due; and must either prove the usury by legal evidence, or have the confession of the party: but, in bankruptcy, it has been considered sufficient to suggest usury in a petition supported by affidavits, merely upon information and belief; putting the party charged to prove against himself, for the purpose, not of giving him his real debt, but of cutting him off from all relief.

Per Ld. Eldon, Ex parte Scrivener, 3 Ves. & Bea. 14; and see 2 Ves. 489; 9 Ves. Jun. 84.

β When usury has been sufficiently pleaded in an action at law, and, on demurrer, the plea adjudged bad, and judgment rendered for the plaintiff, the defendant cannot set up this matter in equity. The defendant at law should have taken up the case to the court of revisal.

Lainme v. Saunders, 1 Monr. 267.

In general, in cases of usury, equity proceeds to compel a discovery upon the complainants bringing into court the principal sum advanced with legal interest, and then the court will relieve the usurious excess.

Taylor v. Smith, 2 Hawks, 465; Wilson v. Carver, 4 Hayw. 90; Marks v. Morris, 4 H. & M. 463; S. C. 2 Munf. 407; 6 Munf. 541; 1 Rand. 172.

Although, upon the bill of the borrower, aid will be extended upon the terms of repaying the sum lent, with lawful interest, yet the lender can have no relief whatever, and his bill to foreclose a usurious mortgage will be dismissed.

M'Brayer v. Roberts, 2 Dev. Eq. 75. See State Bank v. Knox. 1 Dev. & Bat. Eq. 50.

But under a usury law, which does not avoid the securities, and only forbids the taking more than six *per centum per annum*, a court of equity will not refuse its aid to obtain the principal.

De Wolf v. Johnson, 10 Wheat. 367.

A court of equity will relieve against usury, when the remedy is not plain and unembarrassed at law.

Coleman v. Childress, 6 Yerg. 398.

After it has been actually paid, interest may be recovered back in chancery.

Pearce v. Hedrick, 3 Lit. 109; M'Campbell v. Gill, 4 J. J. Marsh. 89; Lawless v. Blakey's Adm'r, 4 Monr. 488; Rodes' Executors v. Bush, 5 Monr. 470.

The plea of the statute of usury ought to be received in a court of equity, at any time before the decree is final, if there be strong reasons, from the statement in the bill, for believing that the matter of such plea is true.

Ellsey v. Lane's Executrix, 4 Munf. 66.ℊ

(H) How far Sureties are affected by usurious Contracts.

B was bound with P as his surety to J S in a bond of 500*l*., and that bond was upon a corrupt and usurious contract against the statute, and P

(II) How far Sureties are affected by usurious Contracts.

was bound unto the plaintiff in a bond as a *counter-bond to save the plaintiff harmless* from the said bond of 500*l.*; B is sued by J S upon the said bond, and so damnified: And thereupon B sued P upon the counter-bond, who pleaded the statute of usury, pretending that all assurances depending upon such usurious contracts are void by the statute. But by the opinion of Wray, C. J., the same is no plea; for *the statute is*, that *all bonds, collateral assurances, &c., made for the payment of money lent upon usury*, shall be utterly void: but *the bond here*, upon which the action is brought, *was not for the payment* of the money lent, *but for the indemnity of the surety.*

2 Le. 166, pl. 200, Basset v. Prowe.

So likewise, in debt on *bond to save the plaintiff harmless from an obligation* wherein he and the defendant were bound to W, &c., *and from all suit concerning the same;* the defendant pleaded the statute of usury, and that it was made upon a corrupt agreement between him and W, which the plaintiff might have pleaded in debt against him by W. But the court held the plea ill; for though the first obligation were void, yet the second obligation is forfeited, because the defendant hath not saved him harmless from suits concerning it, nor does the defendant answer thereto, but to the obligation only.

Cro. Eliz. 642, pl. 43, Button v. Downham; 2 And. 121, pl. 65, S. C., accordingly. But it is there said, that the plaintiff did not know of the corrupt bargain. Noy, 73, S. C., by the name of Downham v. Butter, and judgment for the plaintiff. But it is added that Glanvil said it would be a dangerous precedent to avoid the statute. For the surety may be a friend of the usurer's, who will not plead the statute in an action of debt brought against him, and so the statute would be to little purpose. And after the judgment given for the plaintiff, Glanvil said that that judgment would be quickly carried to Cheapside.

But where, in debt on bond, defendant *pleaded, that he himself borrowed* 100*l. of W, paying for the forbearance excessive usury; and the plaintiff was his surety for the payment, and that the olbigation upon which the action is brought was given* by him to the plaintiff *to indemnify him against W;* Manwood held this a good bar; for when the plaintiff was impleaded upon the principal bond, he might have discharged himself upon this matter, and therefore the laches shall turn to his prejudice; and therefore the issue was joined upon the excessive usury.

3 Le. 63, pl. 93, Potkin's case.

So likewise in debt upon an *obligation to save the plaintiff harmless* from an obligation, wherein the plaintiff, as surety for the defendant, was bound to J S to pay 100*l.*, the *defendant said the obligation* made to J S *was upon a usurious contract, &c., and concluded* sic non damnificatus. Tanfield said, the plea is good, otherwise the statute would be defrauded; for by a *compact*, the usurer would sue the surety, who shall pay him, and have his remedy on his counter-bond. But all the court held it no plea; for he must take care to save his surety harmless. And adjudged for the plaintiff.

Cro. Eliz. 588, pl. 22, Robinson v. May. There is a note added, that the reason conceived was that *the surety by intendment cannot know of the corrupt contract to plead it in avoidance of the bond*, and therefore the principal ought to take care thereof. Ibid.——Goldsb. 174, pl. 107, S. C. held accordingly *per tot. cur.* But the reporter adds—*sed quære.*

(I) What Informations will lie in Cases of Usury, and where they are good, and where not.

An information was moved for against Cawket, a pawnbroker, for taking sixpence a pound per month interest, which was said to be extravagant usury. The court, however, thought there was nothing so enormous in this offence, but that the common method of punishment would be sufficient. But it was argued, that the statute of usury allows the penalty for usury to be recovered by information, or action, and that was argued as a reason why the court should grant it. But the court said, that it was to be understood only of an information *qui tam*. And they farther observed, that the statute chalking out a particular method of proceeding for a new offence, was a farther reason why the court could not grant an information; neither can the party be so much as indicted.

1 Barn. Rep. in K. B. 209, Anon.

The *place where defendant accepted* excessive interest ought to be shown in the information, but not the place where the *contract for the loan* or forbearing was made; for that is not needful: But *per* Clark, J., and *per* Gent, J., and Manwood, C. B., the place where the corrupt bargain was made must certainly be alleged.

Le. 96. pl. 125, Sir Wollaston Dixy's case. An information upon the statute of usury, for a *contract with persons unknown*, recipiendo ultra 10*l.* *in the hundred*, was held ill, because an *informer, who is not party*, although the contract was *ultra* 10*l.*, *&c., per cent., shall not have any benefit unless there was a receipt of the usury according to the contract.* And for that the *recipiendo* is naught, because there is *no place nor time put of the receipt*, which is now traversable in that information. Noy, 143, Nasie's case. ‖See 4 Esp. 152; 1 Camp. 445.‖

The information likewise must *show whose money* it is. *Per* Manwood, C. B.

Le. 97, Sir Wollaston Dixy's case.

‖If A be indebted to B, and B to C, and for a usurious consideration C agree to accept A for his debtor instead of B, this may be laid to be a usurious loan of money from C to A, the new debtor.

Wade *q. t.* v. Wilson, 1 East, 195.

And if forbearance is given for usurious consideration on a note given as a collateral security for the debt of another person, in an action on the statute against the creditor so forbearing, the usury may be described to be for forbearance of money *lent* by the defendant to the collateral surety.

Manners *q. t.* v. Postan, 3 Bos. & Pul. 343.‖

If an information be exhibited in the Exchequer against a usurer, and it charge that he took more than 10*l.* in the 100*l.*, without *showing how much*, such information is utterly insufficient; for the informer ought to set forth the quantity of the interest received, and yet the same is not to be recovered.

Arg. 2 Le. 39, pl. 52, Martin Van Henbeck's case.

Upon an information on the statute of usury, and subpœna awarded out of C. B. against the defendant, issue joined, and found for the informer, it was alleged in arrest of judgment, that the court of C. B. is not to hold plea by *process of subpœna*, but by *original*, and is not aided by the statute of jeofails; for it is not a misconceiving of process, but a disorderly award of it; and it was insisted likewise, that it is *not alleged*, in the information, *by whom, or to whom, nor what sum, or at what place*,

nor when the money was lent, nor against the form of what statute it is; yet judgment was given for the plaintiff.

And. 48, Topeliff v. Waller; ‖Dyer, 346 b, pl. 9.‖

But where an information was exhibited, and showed the usurious contract, in certain whereby it appeared that more than 10*l.* was reserved and received for the loan of 100*l.*, and concluded *contra formam statuti;* yet because it did not expressly state that it was *per corruptam accommodationem*, according to the words of the penal statute, the information was adjudged insufficient.

Arg. 11 Rep. 58 a, Dr. Foster's case, cites it as adjudged. And. 49, pl. 123, Emmet v. Fulwood, seems to be S. C., and the justices of both benches held, that those words ought to be expressly alleged, and not by implication; and cited 10 H. 7, c. 10, and for default of those words the judgment was reversed. The defendant was *indicted for usurious lending* 20*s.* *eâ intentione* to receive 23*s.* within a month, *and that the defendant did receive* 3*s.* for the loan of 20*s.* This, *per curiam*, is not good *without* saying, *quod corruptè agreatum fuit*, and for that reason it was quashed, being removed out of the inferior court. Keb. 629, pl. 111, The King v. Gast or Garth. Croke, J., took a *diversity* between an *information* and a *verdict*, that *in an information the agreement ought to be expressly alleged to be corrupt*, and cited 11 Rep. Dr. Foster's case, *and the Book of Entries*, 333, but that it is otherwise in a verdict, which is the finding of the lay gents. 2 Roll. R. 48, Roberts v. Tremoil.

An *information* upon the state of usury, for a usurious mortgage made, *charged the defendant, that cepit ultra* 10*l.* *in* 100*l.* for the forbearance of one year; and this was *out of the issues, rents, and profits, which he took in Middlesex, of lands in Glamorganshire, in Wales, mortgaged to the defendant.* Manwood said, in the principal case, that the taking of the issues and profits ought to have been laid where the land was. And such was the opinion of the whole court.

3 Le. 238, pl. 327, Owen Morgan's case.

In debt upon the statute 37 H. 8, of usury the (count) was, that he *corruptivè lent* 40*l.* *against the form of the statute;* and that such a day he lent him 20*l.*, &c., *against the form of the statute;* but (*as to this*) *did not say corruptivè.* After verdict for the plaintiff, it was objected, that he ought not to have judgment for either of the sums, it being clearly ill for the 20*l.* for want of the word (*corruptivè*). But all the court held, that being good for part, he shall have judgment for that part; for being for several sums, it is in nature of two several actions.

Cro. Ja. 104, pl. 40, Woody's case. And it was held, in this court, that if the defendant had demurred upon the declaration, it had been good for the one, and the plaintiff should have had judgment for that part. Cro. Ja. 104, in S. C.

Information in the Exchequer, for that the defendant *per viam corruptæ bargainiæ received*, &c. After verdict for the plaintiff, it was moved in arrest of judgment, because he *did not set forth what the bargain was*, but generally, *per viam corruptæ*, &c. *Sed non allocatur;* for this is *the usual course of the Exchequer, and the bargain is to be given in evidence.* But it was agreed, that *in pleading to avoid a bond* or assurance, *it ought to be particularly set forth* because *the party is privy* to his own contract, but the informer is not; and therefore it is sufficient for him to show it particularly in evidence.

Cro. Ja. 440, pl. 13, Bedo v. Sanderson; Hawk. P. C. c. 82, § 24, says, that in pleading a usurious contract by way of bar to an action, you must set forth the whole matter especially, because it lay within your own privity; but that in an information on the statute for making such a contract, it is sufficient to set forth the corrupt bargain generally, because matters of this kind are supposed to be privily transacted; and such information may be brought by a stranger. ‖Vide *infrà*, (K).‖

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An information set forth *that the defendant, by way of a corrupt contract cepit et ad lucrum suum convertit* 40*s. for deferring* the day of *payment of* 25*l. from the* 29*th of July to the* 30*th of May*, (the day on which he took the 40*s.*,) *contra formam statuti.* After a verdict it was moved, that it did *not appear that the* 25*l. was money lent; but it appears that the taking the* 40*s. was after lending, and there is no corrupt agreement laid, either before or at the time of lending.* But adjudged against the defendant: for though it be not well laid, so as to give judgment against the defendant upon the statute 12 Car. 2, c. 13, to pay treble the money lent; yet it is found that by a corrupt agreement he took so much, and therefore gave judgment against him at common law, viz., fine and imprisonment.

Sid. 421, pl. 9, The King v. Walker; Vent. 38, Anon., seems to be S. C., says, it was moved that the time of forbearance was past, and the party might give what he pleased in recompense for it, there being no precedent agreement to enforce him to it. *Sed non allocatur;* for the court said, they would expound the statute strictly; and if liberty were allowed in this case, the brokers might oppress the people exceedingly, by detaining the pawn, unless the party would give them what they please to demand for the time after failure of the payment.

It has been held, that *no indictment will lie* on the statute of usury; for the method the act prescribes must be followed; therefore the indictment must be quashed.

11 Mod. 174, pl. 17, The Queen v. Dye. [Vide Rex v. Upton, 2 Stra. 816; 1 Barnard. K. B. 97, S. C.; Regina v. Smith, 2 Salk. 680.] ‖Since the case of The Queen v. Dye, no indictment seems to have been prosecuted. Mr. Plowden thinks the offence still indictable at common law, p. 220; see Comyn on Usury, 218.‖

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In pleading a usurious contract by way of bar to an action, you must set forth the whole matter especially, because it lay within your own privity;(*a*) but in an information on the statute for making such a contract, it is sufficient to set forth the corrupt bargain generally, because matters of this kind are supposed to be privily transacted, and such information may be brought by a stranger.

Hawk. P. C. c. 82, § 24. (*a*) ‖A general plea of usury is bad on special demurrer. Hill v. Montagu, 2 Maule & S. 378; but the objection is cured by the plaintiff pleading over. Wright v. Wheeler, 1 Camp. 166.

Where the statute is not pleaded, the bond, though usurious, is good.

3 Salk. 391, pl. 7.

But it has been held, that usury cannot be pleaded to a *scire facias* on a judgment.

2 Stra. 1043, Bush and others, assignees of Jones v. Gower. [Ca. temp. Hardw. 233, S. C. In such case the court relieve by staying the proceedings on the judgment, and directing an issue to try whether the contract was usurious or not. Cooke v. Jones, Cowp. 727.] {1 Johns. Rep. 532, n., Wardell v. Eden; 3 Johns. Rep. 139, Starr v. Schuyler; Ibid. 250, Hewitt v. Fitch. Vide 1 Bos. & Pul. 270, Edmonson v. Popkin; 3 Johns. Rep. 142, King v. Shaw.}

A usurious contract was pleaded in bar of debt upon a bond, but it was not said that the defendant was indebted to the plaintiff at the time of the bond given, or that there was an agreement to lend money upon the usurious contract; and for that, judgment was given for the plaintiff.

12 Mod. 385, Crow v. Brown.

Likewise, after a verdict *pro rege* on an indictment for usury, it was moved in arrest of judgment, that they had only laid a corrupt agreement,

without any loan or taking excessive interest in pursuance of it. And judgment was arrested.

2 Stra. 816, The King v. Upton.

Upon usury pleaded to an action against the defendant, as endorser of a note for 200*l.*, the case was, that one Grace took the note upon advancing 197*l.*, when the note had three months to run, and at the three months' end took another note for 200*l.*, upon advancing 3*l.* for other three months. It was insisted, that this was not usury, being a purchase out and out of the notes: and both parties becoming bankrupts, and the commissioners refusing to let these notes be proved, a petition was preferred to the Lord Chancellor, who directed an issue upon them. And now Lee, C. J., held, that this was usury within the meaning of the statute 12 Ann. c. 16, which prohibits the taking more than 5*l. per cent.*, upon any contract directly or indirectly: however, he left it to the jury upon the question, Whether this was to be deemed a purchase, or a loan? who found it to be the latter, and the defendant had a verdict.

2 Stra. 1243, Massa v. Dauling.

In debt on bond defendant pleads *quod corruptè agreatum fuit*, that interest should be paid for it *above the rate of* 6*l. per cent.*: plaintiff demurs: and held good; for that the *plea* shows not *what* interest, nor that the *bond was for the very money*, but only by intendment (to wit) *supra agreamento prædicto* the bond was given; and says not expressly *pro eadem pecunia.* Judgment *pro quer'*. For that they would not easily avoid a bond, and the corrupt agreement ought to be specially and particularly set forth, and the *quantum* of interest, otherwise the plaintiff can never tell what to answer.

2 Show. 329, pl. 339, Henton v. Roffee.

In an error of a judgment in the Palace court, wherein the plaintiff *declared that the defendant became indebted to him by bond in the sum of* 107*l.*; the defendant, without claiming over, *pleaded that he was indebted truly to the plaintiff in* 92*l.* 5*s.* 9*d.*, *and that by way of corrupt agreement for the forbearance* of that sum for a *year this bond was given, &c.* The plaintiff replied, *that the bond was given* pro vero et justo debito, and *traversed the corrupt agreement.* And upon demurrer to this replication, it was insisted that it was ill, because the plaintiff did *not show how much the just debt was. Sed non allocatur:* for there was sufficient to induce the traverse; and if it had been alleged, you could not have traversed the inducement, and the declaration sufficiently shows the debt.

6 Mod. 303, Villars v. Cary.

In debt upon a bond, defendant *pleaded* the statute 12 Car. 2, of usury, and said, *that corruptè agreatum fuit, that he should pay more than* 6*l. per cent.* The plaintiff replied *quod non corruptè agreatum fuit*, and held a good replication; for if by *mistake of the writer* the money was made payable without any corrupt agreement, it is not usurious within the statute.

Freem. 264, pl. 286, Booth v. Cook.

The plaintiff declares upon a *promissory note for* 30*l.* dated 4th Feb. The defendant *pleads that it was corruptly agreed* between him and the plaintiff, *that he should pay* unto the plaintiff 45*s. for the loan* of the said sum of 30*l. for three months*, and then sets out the last statute against usury, &c. It was excepted to this plea, that it was *not averred that the note was given subsequent to the late act against usury.* To which it was

answered and resolved by the court, that by the date of the note it appears to be so.

Fitzgibb. 130, Baynham v. Matthews.

In an *indebitatus assumpsit for* 10*l.* *and a computasset for* 35*l.* in the same declaration, *the defendant pleads the statute of usury* to the *indebitatus*, and *avers that both the indebitatus and* the *computasset were for the same cause of action.* It was resolved, that the averment was naught; for the ground of the *indebitatus* is the debt, and the ground of the *computasset* is the account; and so it cannot be averred that there is the same cause of both, especially as it is here, where one is for 10*l.* and the other for 35*l.* But Hale said, he should have pleaded the statute to the *indebitatus*, and then that afterwards they came to an account for the same wares, &c.

Freem. 367, pl. 472, Tayler v. Herbert.

β Under the statute, a plea claiming a credit on a obligation, for the usurious interest only, and a payment actually made, was holden good.

Fugate v. Ferguson, 1 Blackf. 566.

A defence of usury is in the nature of a penal action, and much strictness is required in pleading it: the plea should clearly show that the defence comes within the statute.

Hancock v. Hodgson, 3 Scam. 333.ℊ

On demurrer in debt it appeared that 500*l.* was lent upon articles dated the 8th of March, to be paid at such a time; and in the mean time *to pay* 15*l.* *half-yearly from November before.* For cause of demurrer it was shown, that it appeared by the declaration that the contract was usurious; but it was answered, that the defendant ought to have pleaded that *corruptè agreatum fuit, &c.*, and so given the plaintiff an opportunity to reply to it. But *upon reading the articles it was, Whereas money was lent, &c.*, which might be in November, or before; and therefore judgment was given for the plaintiff.

Sid. 285, pl. 21, Dande v. Currer. ‖See 5 Barn. & A. 959, and 1 Will. Saund. 295 a, note (f).‖

Debt was brought on a bill to pay 7*l.* the first of May, and on *default* of payment to pay 3*s.* 4*d.* *for every month* that it shall be in arrear after May *the first.* Defendant made no averment that the agreement was to pay the 3*s.* 4*d.* for every month *pro lucro interesse et diem dando solutionis*, but only with a *sic* the said sum exceeded 8*l.* *per cent.* whereas he should have averred that the same did exceed 8*l.* upon the 100*l.*, those being the effectual words in the statute. Judgment *pro quer'.*

Sir W. Jo. 409, pl. 2, Swailes v. Bateman.

In debt on a bond for 100*l.* dated the 12th July, &c., conditioned to pay 54*l.* at *six months' end*, the defendant pleaded the statute 21 Jac. of usury. The plaintiff replied that he lent the defendant 50*l.* on the 12th July, &c., for a year, and that the defendant was to pay for it 4*l.* for the forbearance of one year, and that the plaintiff was not to demand it till the end of the year; *but* that *by mistake of the scrivener it was made but for half a year, which he not knowing, accepted it.* The defendant *rejoined that the lending was only for half a year*, and that he was to pay 4*l.* for it for that time, *absque hoc, that on the said* 12*th of July it was agreed that the loan should be, or that he should forbear it, for a whole year.* Upon demurrer it was objected that the plea was ill, because it was *not pleaded, that corruptè agreatum fuit, &c.* And so the court, *absente* Bramston, held: and they all held the allegation, against the words of the condition, to be good; for

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it is only showing the true agreement; but they all held the rejoinder ill, because in the traverse the defendant had made the day (viz., 12th July) parcel of the issue, when he should only have traversed the agreement. But no judgment was given, because the parties agreed.

Cro. Car. 501, pl. 1, Nevison v. Whitley.

The defendant borrowed 200*l.* *of the plaintiff;* and *it was agreed* between them *that he should pay the* 200*l.* *at such a day, and* 20*l.* *for the interest for one year, and that certain lands should be conveyed to the plaintiff, upon condition that if the money was paid at the day, then the grant shall be void.* The defendant *pleaded the statute of usury, and averred that the land was worth* 12*l.* *a year, and so he had double use.* *The plaintiff replied, that upon the borrowing the* 200*l.* *it was agreed that the defendant should have the profits of the land until breach of the condition, and traversed* that there was *an agreement that he should have the profits and also* 20*l.* *for interest.* And upon a demurrer it was objected, that the replication was ill, because the land being conveyed to the plaintiff, by consequence, the profits are so too; and therefore he cannot aver *any verbal agreement against the deed,* that he had not the profits. But the plaintiff had judgment.

Roll. R. 41, pl. 8, Dodd v. Ellington.

Tanfield, Chief Baron, said, that upon an information betwixt Paramore v. Robinson, in B. R. where *several contracts upon usury being alleged, issue was joined, whether* it were *corruptè agreatum modo et formâ prout,* it was resolved by all the justices of England to be an ill issue; for he ought to have traversed the agreements, because they were several.

Cro. Ja. 544, pl. 4, Heath v. Dauntley.

In debt on bond the defendant *pleaded the statute* of usury *made* 6th of *Feb.* 13 *Eliz.* (*whereas the parliament began* 2*d Feb.* 13 *Eliz.*) The plaintiff replied, that it was not made for usury *contra formam statuti modo et formâ prædict.* Though both parties agree that there is such a statute, yet the court knowing that there is not, and that therefore it cannot be *contra formam statuti;* the court held that no judgment could be given for the plaintiff; and it being in the bar of the defendant, the court held it clearly ill, and that there should be a repleader.

Cro. Eliz. 245, pl. 4, Love v. Wotton.

In *case, &c.*, upon a special promise, the plaintiff *set forth that he was possessed of several pieces of hammered money, &c., and that the defendant in consideration the plaintiff would pay that money, being in number and tale* 300*l.*, *he promised to repay* 300*l.* *of new money, together with* 4*l.* 10*s.* *more for the interest of every* 100*l.* *for eight months, &c., and then declares upon an* indebitatus assumpsit *for* 313*l.* 10*s.* After verdict, it was moved that the contract was usurious, it being to pay 4*l.* 10*s.* for the interest of 100*l.* for eight months: but *per tot. cur.* judgment was given for the plaintiff. It was agreed, that if it had appeared by the plaintiff's own declaration that the contract was usurious, and could not be otherwise, judgment ought to be given against him: but that it *does not appear here that the contract must necessarily be usurious; and the jury having found the* assumpsit, *the court could not intend usury,* but the contrary. And Powell, J., observed, that the consideration of the promise here is, viz., that the said plaintiff would *pay* to the said defendant the said 300*l.*; so that here *is no loan,* without which there can be no usury; and they would not intend a loan, unless the jury had found one.

Lutw. 271, 273, Yeoman v. Barstow.

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The defendant, *in consideration of* 12*l.*, paid him by the plaintiff, gave *bond to pay* the plaintiff 14*l. if he lived six months after* the date of the bond. There was a plea and demurrer, and it was objected, that it appears by the very condition of this bond, that the contract was usurious, it being to pay 14*l.* for 12*l.* in six months after the date of the bond; though this might have made the bond void, in case the statute had been pleaded, yet, that not being done, this objection comes too late.

3 Salk. 301, pl. 7, cites Lutw. Grange's case.

[If there is an agreement to pay legal interest, and a premium is paid down over and above the interest, the agreement is usurious and void. But the penalty under the statute of Anne is not incurred, if the premium itself does not exceed {1} legal interest, nor till more than legal interest is actually received; so that an action may be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it is not a year since that which exceeded legal interest has been paid.

Fisher v. Beasley, Doug. 235. {1} But the usury is complete as soon as the lender receives any part of the growing interest. 1 East, 195, Wade v. Wilson.}

But, where one lends 100*l.* and takes 6*l.* 5*s.* for the interest thereof for three months, by way of advance at the time of lending, the penalty is that instant incurred, and the action for it must be brought within a year from that time.

Lloyd v. Williams, 3 Wils. 250; 2 Bl. R. 702, S. C.; ||Scurry v. Freeman, 2 Bos. & Pul. 381. And the sum actually paid after the interest is deducted may be described as the sum forborne, Ibid.; and see Lee, *q. t.* v. Cass, 1 Taunt. 511; Hutchinson v. Piper, 4 Taunt. 810.||

||Where a premium is actually paid at the time of the contract, and 5*l. per cent.* is agreed to be paid for interest, the offence of usury is complete on receipt of any part of that interest.

Wade v. Wilson, 1 East, 195.||

{But if the contract is laid to be with A and B (who were partners) jointly, and the proof is of a note given by A, alone, the variance is fatal.

1 Dall. 216, Musgrove v. Gibbs.}

[If there be a corrupt agreement for the forbearance of money *till one or the other of two days* at the option of the borrower, it must be so pleaded according to the fact: for if it be pleaded as an *absolute* forbearance *till one of those days*, the evidence will not support the plea.

Tate v. Wellings, 3 Term R. 531.

In an action on a bill of exchange, if there is a plea of usurious agreement, and that the bill was given in consequence thereof, the plaintiff may traverse the usurious agreement, and conclude with a verification.

Smith v. Dover, Doug. 428.]

{A lent B 500*l.*, and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the securities, B gave A 50*l.* and paid interest at the rate of five *per cent.* on the 500*l.* for five years, at the end of which time an action was brought against A, for usury. And it was held that the action was not barred by lapse of time; for that the loan was substantially of no more than 450*l.* and consequently the interest at the rate of five *per cent.* on the 500*l.* received within the last year was usurious.

2 Bos. & Pul. 381, Scurry v. Freeman.}

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ßA defendant may plead to a *scire facias*, brought to revive a decree, which was obtained against him by default, that the original contract was usurious.

Lane v. Ellzey, 4 H. & M. 504.g

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By 13 Eliz. c. 8, § 3, *justices of* oyer *and* terminer, *of assize and of peace, in their circuits and sessions, and mayors, sheriffs, and bailiffs of cities, have power to hear and determine all offences committed against* 37 H. 8, c. 9.

It has been held that the trial should be where the contract was, and not where the bond was made.

Le. 148, pl. 206, Kinnersley v. Smart; Cro. Eliz. 195, pl. 10, S. C. accordingly; for the bond is confessed, and the point is, whether it be made by usury, which was alleged to be where the trial was.

[The defendant lent 2000*l.* to the plaintiff on mortgage, with a usurious clause in the deed, that he should have 40*l.* as a pretended salary for receiving the rents. The deed was made and executed in London: the lands lay in Middlesex: the account was settled in London, and the receipt for the balance signed in London, but the draft given for it was upon a banker in Middlesex. It was adjudged that the *venue* was properly laid in London; for not only the usurious taking, but also the contract, by which the defendant was appointed receiver, were both in London.

Scott v. Brest, 2 Term R. 238.] ‖But it is now settled, that the venue must be laid where the usurious interest is received, and not where the usurious security is given. Scurry v. Freeman, 2 Bos. & Pul. 381; Pearson v. M'Gowran, 3 Barn. & Cres. 700.‖

In an action *tam quam, &c., in the Exchequer*, for taking more than 6*l. per cent., contra formam statuti.* After verdict for the plaintiff it was *moved* in arrest of judgment, *that it lies not in this court for usury committed in London, though it would lie upon the statute of* 21 *Jac.;* and in truth the interest taken here was more than 10*l. per cent.* And by the general conclusion of *contra formam statuti*, it shall be intended against the form of that statute which allows the largest interest, and there are four statutes against usury, one of Hen. 8, which allows 10*l. per cent.;* another of Queen Eliz., which allows 8*l. per cent.;* a third of King James; and a fourth of Charles 2, which allows but 6*l. per cent.* And by the statute of Jac. 1, c. 4, there shall be no suit upon a penal statute, but as therein directed, which does not extend to the court of Exchequer, unless the offence is done in Middlesex. But *per* Hale, C. B.—The offence laid in the information being for taking more than 6*l. per cent.* shall be taken to be grounded upon *that statute that prohibits taking more than* 6*l. per cent.*, and that the law *gives the suit in no court in particular*, and therefore it may well be prosecuted here; though if a particular court had been named, as in 21 Jac., it would be otherwise. The court took time to advise.

Hardr. 420, Anon.

An indictment was brought at the sessions before the justices of the peace at Hick's Hall for usury *contra formam statuti;* and judgment was against the defendant, upon which a writ of error was brought in B. R., and the judgment reversed; for the justices of the peace have no jurisdiction in this case.

2 Salk. 680, pl. 1, The Queen v. Smith; 2 Ld. Raym. 1144, S. C.; 3 Salk. 188, The King v. Bakestraw. And in the case of the King v. Pexley, it was admitted by the counsel that moved, that upon the statute of Queen Elizabeth, which prohibits the

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taking above 10*l. per cent.*, the justices of peace at sessions have jurisdiction; but insisted that they have not upon any of the later statutes. 2 Barnard. R. in B. R. 143, The King v. Pexley.

If an *information* be brought *against* two, upon the statute of usury, and *one only be found guilty*, no judgment can be given in this case. *Arg.* to which the court agreed.

Lane, 19, Page's case.

In an information upon the statute of usury, the defendant pleads *nil debet.* The jury find a usurious receipt, but do *not find any loan.* A new *venire facias* should be awarded, and not a new *nisi prius.*

Jenk. 283, pl. 13; 8 Rep. 65, Loveday's case.

Usury *shall not be intended, unless the jury find it* expressly.

Arg. Bridg. 212, Webb and Jucks v. Worfield, cites 10 Rep. 56. {Vide 1 Wash. 368, M'Guire v. Warder.}

{The court has the exclusive power of deciding whether a *written* contract be usurious.

3 Cran. 180, Levy v. Gadsby.}

With respect to the law concerning *evidence* in case of usury, it has been ruled, that he who hath agreed to pay money upon a usurious contract, shall not be admitted to give evidence upon an information against the usurer, unless he have paid off the whole debt; for by such means a man might avoid his own act and deed.

Hawk. P. C. c. 82, § 27. β The payment and receipt of usurious interest is *primâ facie* evidence of a usurious contract. Dennis v. Crawford, 3 Harr. (N. J.) R. 325. β

β Though, in general, parol evidence cannot be given to vary the terms of a written contract, yet it is the effect of the statutes against usury to admit such evidence to vary or alter the terms of a written instrument, and to expunge from it all that is usurious.

Fenwick v. Ratliff's rep's., 6 Monr. 155; Grimes v. Shreeve, 6 Monr. 553; Lindsey v. Sharp, 7 Monr. 753. β

Also, an information for a usurious contract on a loan of money, cannot be supported by evidence of such a contract on a bargain concerning wares sold.

Hawk. P. C. c. 82, § 28.

[But where in an action on the statute for the penalty, the declaration stated a specific sum of money to have been lent (in which the usury consisted,) but the evidence was, that the loan was *part in money*, and the rest in goods of a known value, which the borrower *agreed to take as cash;* it was holden to be good evidence to support the declaration.

Barbe v. Parker, 1 H. Bl. 283.]

In a *qui tam* on the statute of usury, the Chief Justice refused to let the party to the contract be a witness to prove the repayment of the money, because till that was proved he was no witness at all.

1 Stra. 633, Shank, *qui tam*, v. Payne.

[It has been ruled, however, in later cases, and seems now to be settled, that in such an action, the borrower of the money is a competent witness to prove the whole case, as well the repayment of the money as the other facts.

Smith v. Prager, 7 Term R. 60; Abrahams v. Bunn, 4 Burr. 2251.]

{And if the usury be specially pleaded, and the court reject the evi-

dence offered on such special plea, it may notwithstanding be admitted on the general issue.

3 Cran. 180, Levy v. Gadsby.}

‖ In an action against the defendant for penalties for discounting a bill for usurious interest, the evidence to fix the defendant was, that a person named Brown demanded payment, and commenced an action against the acceptor in the defendant's name; and on receiving the amount of the bill and costs of the proceedings, gave a receipt as agent for the defendant; it was held that this alone was good *primâ facie* evidence of the defendant having received the usurious interest.

Owen *q. t.* v. Barlow, 1 New R. 101.‖

On a motion for leave to plead double, the court declared, that on *non assumpsit* the defendant might give in evidence a usurious contract, because that makes it a void promise; but in the case of a specialty, it must be pleaded. And on the trial the defendant was admitted to that evidence upon the general issue, and the plaintiff was nonsuit.

1 Stra. 498, Lord Barnard v. Saul; {3 Cran. 180, Levy v. Gadsby.} ‖In an action by the endorsee against the endorser of a bill, where the defendant proves usury in the connection or negotiation of the bill, the plaintiff must prove himself a *bonâ fide* holder, although he have received no notice to prove consideration. Wyatt v. Campbell, Moo. & Malk. 80.‖

β The limitation in favour of the usurer runs from the time the usurious interest is paid.

Rodes's executors v. Bush, 5 Monr. 469.

But in Kentucky, it has been holden that taking in a note given upon a usurious contract, and executing another in its stead to a creditor of the usurer, gives the obligor an instantaneous right of action to recover the usury, and the statute of limitation commences to run from that time.

Breckenridge v. Churchill, 3 J. J. Marsh. 16.g

VERDICT.

THE word Verdict is derived from the two Latin words *veritatis dictum*.

β Verdict is the unanimous decision made by a jury, and reported to the court, on the matters lawfully submitted to them in the course of the trial of a cause.

Bouv. L. D. h. v.

The verdict recorded in court is the only proper verdict; the written paper returned by the jury as their verdict is not evidence nor part of the record.

Dornick v. Reichenback, 10 S. & R. 84.g

Costs and damages, which might very well have been treated of under this title, have been treated of under the titles "COSTS" and "DAMAGES."

(A) Of a Verdict *de bene Esse.*

The remaining matter, which appertains to this title, shall be ranged in the following order.

(A) Of a Verdict *de bene Esse.*

(B) Of a Privy Verdict.

(C) Of a General Verdict.

(D) Of a Special Verdict.

(E) Of the Province of the Court where a Special Verdict is found.

(F) Of a Verdict in which the Jurors did not all agree.

(G) Of the Power of the Jury to depart from a General Verdict, after it is given in open Court.

(H) In what Cases a Verdict is bad, on account of Misbehaviour in one or more of the Jurors.

(I) In what Cases a Verdict is bad, on account of Misbehaviour in one of the Parties.

(K) Of a Verdict upon an informal or immaterial Issue.

(L) Of a Verdict upon an Issue, part of which is insensible or insufficient.

(M) Of a Verdict which does not find all that is in Issue.

(N) Of a Verdict which finds a Thing that is not in Issue.

(O) Of a Verdict which varies from the Issue.

1. *In an Action of* Assumpsit.
2. *In an Action upon the Case.*
3. *In an Action of Covenant.*
4. *In an Action of Debt.*
5. *In an Action of Ejectment.*
6. *In an Action of Replevin.*
7. *In an Action of Trespass.*
8. *In divers other Actions.*
9. *In a criminal Prosecution.*

(P) Of a Verdict where the words *Modo et Forma* are used in the Traverse upon which Issue is joined.

(Q) Of a Verdict which does not find the Matter in Issue with Certainty.

(R) Of a Verdict which does not find the Matter in Issue expressly.

(S) Of a Verdict which finds a Matter in a Foreign County.

(T) Of a Verdict which is contrary to a Matter of Record.

(U) Of a Verdict which is contrary to a Matter of Estoppel.

(W) Of a Verdict which is contrary to something that is confessed, or not denied in the Pleadings.

(X) What omission in the Pleadings is cured by a Verdict.

(Y) What Mistake, or Omission, in the copy of the Issue delivered is cured by a Verdict.

(Z) Of divers Things, which did not fall properly under any of the foregoing Heads.

(A) Of a Verdict *de bene Esse.*

If the judge, before whom the cause is tried, have a doubt as to the propriety of finding a verdict, he may direct the jury to find one *de bene esse;* which verdict, if the court shall be of opinion that a verdict ought to have been found, shall stand.

Brown, Meth. 13.

(C) Of a General Verdict.

If an action of debt be brought against a husband and wife, and at the trial of the cause the wife make default, and a protection be cast for her, the judge may direct the jury to find a verdict *de bene esse;* which, if the protection be disallowed by the court, shall stand.

Bro. *Protect.* pl. 3.

(B) Of a Privy Verdict.

A PRIVY verdict is so called, because what is thereby found ought to be kept secret until a verdict is given in open court.

1 Inst. 228. {Vide 1 Johns. Ca. 308; 3 Johns. Rep. 255.} ꝑThe verdict must be openly pronounced by the jury. Johnson v. Depuy, 1 Penning. 165.ꝺ

A jury may find differently by a verdict given in open court, from what they found by a privy verdict.

1 Inst. 227; Moor, 33.

The jury, who by a privy verdict had found for the defendant, did by a verdict given in open court find for the plaintiff. Both verdicts being returned upon the *postea*, it was holden that the latter should stand: and by the court,—The verdict given in open court is the binding verdict, the other being only allowed for the ease of the jury.

Plowd. 211; Saunders v. Freeman, Dyer, 217.

It is in one book laid down, that a privy verdict cannot be given in a case of life or member.

1 Inst. 227.

In two other books it is laid down, that a privy verdict cannot be given in a case of felony; because the jury are directed, and ought, in such case, to look upon the prisoner when they give their verdict.

Raym. 193, Rex v. Ladsingham; 1 Ventr. 97.

But it is in these books said that wherever the personal appearance of the defendant is not necessary, the jury may give a privy verdict, and that it is usual so to do.

Raym. 193, Rex v. Ladsingham; 1 Ventr. 97.

In an information for a misdemeanor, the jury had given a privy verdict. The verdict afterwards given in open court was upon this account objected to; but it was holden to be good.

Raym. 193, Rex v. Ladsingham; 1 Ventr. 97.

[If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *public* and not a *privy* verdict.

3 Bl. Com. 377.]

(C) Of a General Verdict.

A GENERAL verdict is so called, because the whole matter in issue is thereby found generally.

ꝑ The verdict is general, when it finds the facts and the law, as, for instance, that a certain sale took place; it is special, when it finds certain facts, leaving it to the court to decide whether those facts constitute a sale.

Chidoteau's Heirs v. Dominguez, 7 Mart. R. 521.ꝺ

If the venue in an action of assault and battery be laid in the parish of A, the jury shall not be received to say, that the defendant is not guilty in

(D) Of a Special Verdict.

the parish of A; for the jury must either find the whole matter in issue specially, or they must find generally that the defendant is or is not guilty.

2 Roll. Abr. 694, U, pl. 1.

The jury may in any case, if they will take upon themselves the knowledge of the law, find a general verdict; but it is in some cases dangerous for them so to do; for if they mistake the law, they run themselves into the danger of an attaint.(*a*) It is therefore the safer way, for the jury to find a special verdict in a case which appears to them doubtful.

1 Inst. 228; 4 Rep. 54. ‖(*a*) The practice of setting aside verdicts upon motion, and of granting new trials, superseded the use of attaints; there are very few instances of an attaint in the books later than the sixteenth century. Cro. Eliz. 309; 3 Bl. Com. 405; and the proceeding is now abolished by 6 G. 4, c. 50, § 60.‖

β When there is a general verdict, and some of the counts are bad, and the court below enters judgment on the counts supposed to be good, the judgment will be reversed.

Harker v. Orr, 10 Watts, 245.

The rule, that a judgment cannot be entered upon a general verdict in favour of the plaintiff, when his declaration contains two or more counts, one of which is bad, does not apply to the case of a general verdict in favour of the defendant, when some of his pleas are bad.

Wilson v. Gray, 8 Watts, 37.

A jury are not bound to find any other than a general verdict, although the judge directs them to find specially as to a particular fact, on which a legal question may be raised.

Devizes, Mayor &c.. v. Clark, 3 Ad. & Ell. 506.g

(D) Of a Special Verdict.

A SPECIAL verdict is so called, because some matter of fact is thereby found specially.

The design of a special verdict is to submit some questions of law, which arise upon the matter of fact found specially, to the consideration of the court.

β A special verdict must contain fact, and not evidence of facts.

Brown v. Ralston, 4 Rand. 504.

Special verdicts leave no room for presumption.

Bolling v. The Mayor, &c., 3 Rand. 536.g

It seems to have been always holden, that if the general issue be pleaded, the jury may find a special verdict.

Bro. *Verd.* 56, pl. 45, pl. 56, pl. 85.

It is laid down in two books, that if an issue be joined upon a special plea, the jury cannot find a special verdict.

Bro. *Verd.* pl. 45; Dyer, 117.

But it is laid down in another book, that although there be cases to the contrary, it is settled, that the jury may find a special verdict as to the matter in issue upon a special plea; for that a question of law may as well arise in such case, as where the general issue is pleaded.

1 Inst. 226, 227.

And in another book it is said to have been holden, that in all pleas of the crown, and in every civil action, whether it be real, personal, or

mixed, in which an issue is joined betwixt the king and a party, or betwixt party and party, the jury may find a special verdict.

9 Rep. 12, Dowman's case.

It is said, that the court cannot refuse to receive a special verdict, provided the matter specially found be pertinent to the issue: for that the jury have a right to find such verdict in every case which appears to them doubtful.

1 Inst. 228; 9 Rep. 12.

But, although the jury may find a special verdict in every case which appears to them doubtful, it is not necessary, even for their own safety, to do this in every such case; for if the judge before whom the cause is tried take upon himself to determine the question of law, concerning which the jury doubt, and direct them to find a general verdict, they may, without danger to themselves, find such verdict.

1 Inst. 228; Vaugh. 145; Ld. Raym. 1494; Fost. 256, 257.

If, upon the trial of a person indicted for murder, it appear that at the time of the homicide he was insane, the jury may, upon being informed by the judge that an insane person cannot be guilty of murder, it being a maxim of law that *crimen non contrahitur nisi voluntas sit nocendi*, find a general verdict of not guilty.

2 H. H. P. C. 303; Fost. 279. ‖By 39 & 40 G. 3, c. 94, where it shall be in evidence that a person charged with treason, murder, or felony, was insane at the commission of the offence, the jury shall be required to find that fact specially, and to declare whether such person was acquitted on account of insanity.‖

If, upon the trial of a person indicted for murder, the judge be, upon all the circumstances of the case, of opinion that the homicide is justifiable, the jury may find a general verdict of not guilty.

2 H. H. P. C. 303; 1 Hawk. 70; Fost. 279.

If, upon the trial of a person indicted for murder, the judge be, upon all the circumstances of the case, of opinion that the homicide amounts to manslaughter, the jury may find a verdict of manslaughter.

It is said, that if the jury are dissatisfied with the determination of the judge, as to the question of law concerning which they doubt, they are not obliged to follow his direction, but may find a special verdict. But it is likewise said, that the jury will, if they are well advised, find a general verdict, in every case wherein the judge determines the question of law concerning which they doubt, and directs them to find such verdict.

Ld. Raym. 1494; Fost. 256, 257.

Nor are they in such case, although the judge should be mistaken, liable to an attaint; for as it is only said, *that the jury are liable to an attaint, where they will take upon themselves the knowledge of the law, and mistake the law*, it follows that they are not liable thereto when they find according to the direction of the judge.

1 Inst. 227; 4 Rep. 54.

The minutes for a special verdict are to be approved of by the judge; it being his province to take care that the question of law be fairly stated, and they ought to be delivered to the jury before they find the verdict.

2 Lill. Abr. 791, F.

If this be not done, the jury may find a general verdict without incurring the danger of an attaint.

2 Lill. Abr. 790, H.

(D) Of a Special Verdict.

The minutes for a special verdict intended to be found ought to be signed by one of the counsel for each party.

But, if all the counsel for one of the parties refuse to sign the minutes for a special verdict, the judge may direct the jury to find one from the minutes as signed by one of the counsel for the other party.

2 Lill. Abr. 793, (G).

It is the duty of the party, at whose instance a special verdict was found, to draw it up from the minutes: but either of the parties may draw it up; and if one of them do this, and the other neglect to pay his share of the expense, the court will not hear counsel for him when the verdict is set down for argument.

2 Lill. Abr. 790, (E).

If a special verdict be not drawn up according to the minutes, as signed and approved of at the trial of the cause, the court may order it to be amended from the minutes.

2 Lill. Abr. 790, (D); ‖Morse v. Chase, 4 Watts, 259.‖

If the question of law be not properly stated in a special verdict, and the verdict cannot be amended from the minutes, as signed and approved of at the trial of the cause, the court may order it to be amended from the notes of the judge before whom the cause was tried.

2 Lill. Abr. 790, (D).

It is in one book laid down generally, that the court may order a special verdict to be amended, from the notes of the judge, in such manner as to bring the question of law properly before the court.

2 Lill. Abr. 797, (H).

It is in another book laid down, that the court may order a special verdict to be amended as to a matter of fact, from the notes of the judge before whom the cause was tried.

2 Roll. Abr. 701, pl. 16.

In an action of trover it was found by a special verdict, that the defendant, who was a considerable farmer, did annually buy and sell for gain, divers large quantities of potatoes; and the question submitted to the court was, whether he was a trader within the meaning of any statute of bankruptcy? The court inclined to be of opinion that he was; but a doubt arose, whether it was not necessary for the jury to have found the quantity of potatoes which the defendant did annually buy and sell, that the court might be better able to judge how far he sought his living by buying and selling. Pratt, C. J., did not think it necessary that this quantity should be found, it being in his opinion sufficient, if the defendant did in any degree seek his living by buying and selling. Eyre, J., and Fortescue, J., being of a different opinion, the cause was adjourned. A motion was afterwards made, upon an affidavit of the quantity, which was, at the trial of the cause, proved to have been annually bought and sold, that a *venire facias de novo* might be awarded. This was not awarded: but the special verdict was ordered to be amended as to this. The reporter adds, that it was so amended; and that at another day judgment was given for the plaintiff.

Stra. 513, 514, Mayo v. Archer. ‖As to the amending of special verdicts, vide *suprà*. Vol. i., tit. *Amendment*.‖

It seems, however, to be the better opinion, that the court cannot order a special verdict to be amended as to a matter of fact.

‖See Spencer v. Goter, 1 H. Black. 78;‖ {but see 1 Johns. Rep. 149.}

It is in one case laid down, that if the proper facts are not found by the special verdict, the court will not hear the question of law argued; because no judgmeut can be given upon the verdict: but will award a *venire facias de novo*,{1} that the proper facts may be found.

2 Lill. Abr. 790, (D), 792, (B). {1} 1 Hen. & Mun. 213, Robinson's Adm'r v. Brock; Ibid. 387, Pegram v. Isabell.}

In another case it is laid down, that if a proper fact be omitted in the minutes for a special verdict, the court cannot order the verdict to be amended as to this, although the counsel for both parties consent thereto; for that this would amount to making a new verdict as to that fact by the court and counsel. It is added, that the court will in such a case award a *venire facias de novo*.

2 Lill. Abr. 791, (B); {1 Johns. Rep. 150, *contrà*.}

In another case it is laid down, that a special verdict, in which the jury have omitted to find a proper fact is not good; for that the court will never determine the question of law, unless every proper fact be found by the jury.

Gilb. Eq. R. 255, 256, Lodge v. Jennings.

The opinion, that the court has no power to amend a special verdict as to a matter of fact, is moreover confirmed by divers cases;(*a*) in which it is laid down, not only that every proper fact must be found by the jury, but also that it must be found expressly; it not being sufficient for the jury to find {2} evidence or circumstances, from which the court may fairly infer a fact.(*b*)

‖(*a*) It is laid down in a valuable work, that if a special verdict is defective, so that the courts are not able to give judgment thereon, they will amend it by notes of counsel, or even by an affidavit of what passed on the trial. See Tidd's Prac. 713, 897, (9th edit.;) and it seems that special verdicts may be amended by the judge's or counsel's notes in civil cases. Lord Raym. 141, 335; Manners v. Postan, 3 Bos. & Pul. 343; Salk. 47; Bull. N. P. 320, 2 Lord Raym. 1036. If misstated, the parties will have leave to amend it. 1 Burr. 617. (*b*) On this ground a *venire de novo* was awarded in Bird v. Appleton, 1 East, 111; and see 3 Taunt. 209. But it is sufficient for the jury to find such facts from which the court may draw a conclusion of law, or a mixed conclusion of law and fact, without drawing such conclusion themselves. 8 Price, 256.‖ {2} 1 Hen. & Mun. 235, Henderson v. Allens.}

The matter in issue was, whether J S had resigned a benefice to a bishop. The jury found an instrument, under the seal of the bishop, upon which there was an endorsement that J S did resign the benefice to him, and that he accepted the resignation. The verdict was holden to be bad; because it did not find expressly, that J S had resigned the benefice.

Noy, 147, Smith v. Foaves.

An estate having been granted by copy of court-roll to three persons for their lives, the matter in issue was, whether a heriot was, by the custom of the manor, due upon the death of one of them. The jury found, that the custom of the manor did not warrant the granting of an estate for three lives. The verdict was holden to be bad; because it only found argumentatively, that a heriot ought not in the present case to be paid; whereas the jury ought to find every fact expressly.

2 Roll. Abr. 693, (S), pl. 1.

(E) The Province of the Court on a Special Verdict.

If the matter in issue be, whether an estate may by the custom of a manor be granted by copy of court-roll for two lives, and the jury find, that an estate may by the custom of the manor be granted for three lives, the verdict is bad; because it is only argumentative to say, that, inasmuch as a greater estate may by the custom of the manor be granted, a less one may.

2 Roll. Abr. 693, (S), pl. 2.

If the consequence of the verdict upon an indictment may be corporal punishment, every proper fact must be found expressly; it not being sufficient for the jury to find either evidence or circumstances, from which the court may fairly infer a fact.

12 Mod. 628, Rex v. Plummer. ‖In Ld. Raym. 141, Ld. Holt said, a special verdict could not be amended by the notes in a capital case as in civil cases; and see Salk. 47: *sed* vide Stra. 844, and case of Sarah Hazel, MS. 24 G. 3; 2 Hawk. P. C. 622, (8th ed.)‖

β If, in a special verdict, the jury find the issue, all they find beyond is surplusage.

United States v. Bright, Bright's Trial, 199. See Cavene v. M'Michael, 8 S. & R. 441; Fisher v. Kean, 1 Watts, 259.

If instead of finding facts, the special verdict sets out the evidence, a new trial will be granted.

Clark v. Halberstadt, 1 Miles, 26.

The court decide the law upon the facts stated upon a special verdict; but if instead of a general conclusion, the jury express doubt only as to particular points, the court will decide the law only upon those points.

Peterson v. United States, 2 Wash. C. C. R. 36.

When a special verdict is defective, it may be amended from the notes of counsel or on affidavit.

Morse v. Chase, 4 Watts, 259.

On a special verdict, the court are confined to the facts found.

Crousillat v. Ball, 3 Yeates, 373; Bolling v. The Mayor, &c., 3 Rand. 563.

A verdict may find generally, for either party, dependant upon a single point of law presented to the court, although such verdict is not a special verdict.

M'Michan v. Amos, 4 Rand. 184.

A special verdict is defective, which does not find whether the abandonment was in reasonable time.

Chesapeake Ins. Co. v. Stark, 6 Cranch, 268.

Where the essential facts are not directly found by the jury in a special verdict, although there is sufficient evidence to establish them, the Supreme Court will not, on error, render a judgment on such imperfect finding.

Barnes v. Williams, 11 Wheat. 415.ℊ

(E) Of the Province of the Court where a Special Verdict is found.

If the jury, after finding a fact specially, take upon themselves to draw a conclusion not warranted by law, the court ought not in giving judgment to pay any regard to the conclusion of the jury; because they ought not to have drawn such conclusion.

11 Rep. 10, Priddle's case.

If the issue in an assize be, whether there is a seisin, and the jury, after

finding some fact specially, conclude with saying that this amounts to a seisin, the court without paying any regard to the conclusion of the jury, will judge whether the fact found do amount to a seisin.

Bro. *Verd.* pl. 41.

In an action against an executor, the issue was whether he had assets in his hands. The jury found that the defendant's testator, in a lease granted by him, had reserved a rent to himself, his heirs and assigns, and that the defendant had received the rent from the time of his testator's death; and they concluded with saying that this is assets. The court held the conclusion to be void; because it appeared from the fact found, that the rent ran with the reversion, and consequently that, as it did not belong to the executor, but to the heir, it was not assets.

Dyer, 362; Anon., Hob. 53.

If the jury find a deed specially, they ought to find it *in hæc verba*, and not to find what they judge to be the substance of the deed, that the court may have an opportunity of inspecting the deed, in order to put a construction thereupon: but if the deed be lost, it is the duty of the jury to find the substance thereof, in case this be proved.

Vaugh. 77, Rowe v. Huntingdon; ‖Cro. Eliz. 515; 2 W. Saund. 77 c.; Buzzard v. Capel, 8 Barn. & C. 141.‖

The court will never entertain a doubt, concerning any thing that is not submitted to their consideration by a special verdict; but will, on the contrary, intend every thing which can be fairly intended, in order to support the verdict.

5 Rep. 97, Goodall's case; ‖O. Bridgman's R. 88, 474, 558.‖

The question submitted to the court by a special verdict was, whether the resignation of a donative to the donor be good; but it was not found that the donor had accepted the resignation. It was holden, that the acceptance of the resignation should be intended: and by the court,—The question submitted to our consideration is, whether the resignation of a donative to the donor be good; and we will never entertain a doubt as to any thing whereof the jury have not doubted.

Cro. Ja. 63; Fairchild v. Gayre, Hob. 261. {Vide 1 Hen. & Mun. 387, Pegram v. Isabell.}

In an action of *ejectione firmæ* the jury found, that the premises in question were granted by letters patent of King Henry the Eighth, and they concluded with saying, that if the court shall be of opinion that the letters patent are good, then they find for the defendant; but if the court shall be of opinion that the letters patent are void, then they find for the plaintiff. Upon arguing the special verdict it was insisted that, as no title to the premises is found in the plaintiff, he is not entitled to judgment, even if the court should be of opinion that the letters patent are void. Judgment was given for the plaintiff: and by the court,—As the question submitted to our consideration is, whether the letters patent are void, and we are of opinion that they are void, we will, as nothing is found to the contrary, intend, that the plaintiff has in all other respects a good title to the premises.

Cro. Car. 22, Castle v. Hobbs.

‖If the verdict, whether general or special, is imperfect, by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages, the court will award a *venire de novo*.

Ld. Raym. 1521, 1584; Stra. 887, 1124; 2 Keny. 388; 5 Burr. 2669; 7 Term R. 52; 1 East, 111; 2 Bing. 262; 4 Barn. & C. 69; 6 Dow. & Ry. 68.‖

(G) Of the Power of a Jury to depart from a Verdict.

β Where a special verdict is imperfect, by reason of ambiguity or uncertainty, so that the court cannot say for which party the judgment ought to be given, a *venire de novo* will not be awarded.

Bellows v. The Hallowell and Augusta Bank, 2 Mason, 31.ℊ

(F) Of a Verdict in which the Jurors did not all agree.

In very ancient times, it was not necessary in a civil cause for all the jurors to agree in a verdict. But it has been for many years settled, that if in a civil cause the jurors do not all agree in a verdict, the verdict is bad.

2 H. H. P. C. 297. ‖ As to the unanimity of juries, see Barrington on Stat. 20.‖

In an assize, the justices took a verdict of eleven of the jurors, the twelfth not having agreed therein. The verdict was, upon great deliberation, holden to be bad; and a *venire facias de novo* was awarded: and by the court,—The justices ought not to have taken the verdict, but to have carried the jurors with them in a cart, until they all agreed in a verdict.

41 Assize, 11; Bro. *Verd.* pl. 49.

The twelfth juror, who, instead of agreeing with his fellows in the verdict, said he would rather die in prison than agree therein, was in the case last cited fined and imprisoned: but he was afterwards discharged; and it was said, that no man ought to be punished for not agreeing in a verdict, which he does not think a right one.

41 Assize, 11; 2 H. H. P. C. 297. ‖ See Fortescue de Leg. by Amos, p. 99, and the books there cited.‖

The jurors are not obliged to agree in the reason for finding a verdict as it is found; and if a reason be given by one or more of them, upon a question being asked by the judge, for finding it as it is found, this is not to be considered or recorded as part of the verdict.

Vaugh. 150, Bushel's case.

β A verdict will not be set aside because one of the jurors dissented from the verdict, and afterwards agreed with the remainder, upon condition that no verdict should be rendered unless the court refused to discharge them.

Harrison v. Rowan, 4 Wash. C. C. R. 32.

A verdict will not be set aside on the oath of one of the jurors, that he did not assent.

Clark v. Reade, 2 South. 486.

When the jury agree upon a verdict during the adjournment of the court, and separate by permission, if, on coming into court, one of the jury dissents, judgment cannot be entered on the verdict.

Lawrence v. Stearns, 11 Pick. 501.

When the jury seal a verdict in their room, and afterwards come into court, and vary its terms, the latter is the true verdict.

Rousseau v. Daysson, 8 Mart. N. S. 273.ℊ

(G) Of the Power of the Jury to depart from a General Verdict after it is given in open Court.

If a jury, who, by mistake, or from partiality, have given an improper verdict, do of themselves give a different verdict before the improper verdict is recorded; or, if, at the recommendation, or by the leave, of the judge, they go together again before the improper verdict is recorded, and

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afterwards give a different verdict, the verdict which is last given shall stand.

1 Inst. 227; Plow. 212; 2 H. H. P. C. 299, 300. β See *antè, Amendment* and *Jeofail,* (E,) and *Assumpsit,* (F).

In a writ of conspiracy against two, the jury gave a verdict of guilty as to one, and of not guilty as to the other. At the recommendation of the judge they went together again, to reconsider their verdict, and afterwards gave a verdict of guilty as to both.

Bro. *Jur.* pl. 7.

The title to three acres of land being in issue, the jury as to one of the acres gave a verdict for the plaintiff, and as to another for the defendant; but as to the third said they were not agreed. By leave of the court they went together again, to consider of a verdict as to the third acre. Afterwards, without taking any notice of the verdict already given, they gave a verdict as to all the three acres for the plaintiff. The latter verdict was, upon great deliberation, holden to be good.

Dyer, 204, 205.

It is said, that, after a jury have given a verdict of not guilty in an indictment for felony, the judge may, if the verdict be in his opinion contrary to clear and full evidence, send them out again to reconsider their verdict: but it is likewise said, that, if the jury will stand to their verdict, the judge is bound to receive it. It is added, that the king may in such a case bring an action of attaint.

2 H. H. P. C. 310.

‖ Where the jury on the trial of an information for a libel were not all present when the verdict of guilty was delivered, and it was therefore uncertain whether they all heard the verdict pronounced by the foreman, the court, on these facts being stated by the judge who tried the cause, with the consent of the defendant, ordered a new trial; but they refused to hear a statement of one of the jurymen on affidavit.

Rex v. Wooller, 2 Stark. R. 111.‖

β A verdict may be varied or changed at any time before it is recorded, and a sealed or privy verdict may be changed in open court.

Edelen v. Thompson, 2 Har. & Gill, 31; Adkins v. Blake's Administrators, 2 J. J. Marsh. 42.β

(H) In what Cases a Verdict is bad on account of Misbehaviour in one or more of the Jurors.

If the jurors, when they go from the bar to consider of a verdict, do without the leave of the court take with them any writing under seal, which has been given in evidence, they are guilty of a misbehaviour; but the verdict is good.

Bro. *Enquest,* pl. 49; 2 Roll. Abr. 714, pl. 6, pl. 7.

It is in divers books laid down generally, that if the jurors, when they go from the bar to consider of a verdict, do, without the leave of the court, or the consent of both parties, take with them any writing not under seal, which has been given in evidence, they are guilty of a misbehaviour; but that the verdict is good.

1 Inst. 227; Cro. Eliz. 411; 12 Mod. 520.

The jurors, when they went from the bar to consider of a verdict, did, without the leave of the court, or the consent of both parties, take with

them an act of common council which had been given in evidence. The verdict was holden to be good; and by Holt, Ch. J.—It was very improper behaviour in the jury: but as the act of common council was evidence for both parties, the verdict ought to stand. In the case of Lady Joy, a verdict was set aside, because the jury did, without the leave of the court or the consent of both parties, take with them a map which had been given in evidence: but the verdict was, in that case, set aside, because the map was evidence for only one party, which is not the present case.

Ld. Raym. 148, Rex v. Burdett.

After the jurors were gone from the bar to consider of a verdict, one of the witnesses, who had been examined on the part of the defendant, was sent for and re-examined by them; and they afterwards gave a verdict for the defendant. Complaint being made of this to the judge, the jurors confessed that they had re-examined the witness; but they said, that the evidence upon the re-examination was in effect the same as he had given in court. The verdict was holden to be bad; and a *venire facias de novo* was awarded.

Cro. Eliz. 189, Metcalfe v. Dean.

In another case, the case of Metcalf and Dean is said to be law; because the evidence improperly received by the jurors was parol evidence; for that, as the witness might vary in his evidence upon the re-examination from what he had given in court, it would be of the most dangerous consequence to suffer such verdict to stand: but it is in this case said, that there is not so much danger in letting a verdict stand, where the jurors have improperly taken with them written evidence which has been given in court; because written evidence remains always the same.

Cro. Eliz. 411, Vicary v. Farthing.

The plaintiff in an assize delivered a writing relative to the matter in issue to a person returned upon the panel. This person being sworn upon the jury, he, after the jurors were withdrawn to consider of a verdict, showed the writing to his fellows. A verdict being given for the plaintiff, the court was moved for judgment. For the plaintiff it was said, that as the writing was to the same effect as some of the evidence given in court, the behaviour of the plaintiff was not so bad, as if evidence to the same effect had not been given in court. It was holden that he should not have judgment; and by Gascoigne and Hulls: after the jurors were sworn they ought not to see or to carry with them any writing, except it has been given in evidence, and was delivered to them by order of the court.

11 Hen. 4, 17 b, 18 a.

After the jurors were gone from the bar to consider of a verdict, one of them went from his fellows. He soon after returned with a copy of a court-roll in his hand, and told them that the merits, with which he was perfectly well acquainted, were with the plaintiff. Hereupon the other jurors, before of a different opinion, were prevailed upon by him to give a verdict for the plaintiff. The verdict was afterwards set aside.

1 Sid. 235, Goodman v. Coddrington. β If, after a cause is submitted to them, and before the jury have agreed on a verdict, they separate and afterwards return a verdict, it will be set aside. Lester v. Stanley, 3 Day's Cas. 237; Howard v. Cobb, 3 Day's Cas. 310.ℊ

Upon a writ of error it was assigned for error, that one of the jurors did, after they were gone from the bar to consider of a verdict, show to his fel-

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lows a writing in favour of the plaintiff that had not been given in evidence, by reason of which they found a verdict for the plaintiff. It was holden, that this was not error: and by the court,—as it does not appear that the writing was delivered to the juror by the plaintiff, it shall be intended that it was in his own possession; and if so, as he might have given the writing in evidence, it was lawful for him to show it to his fellows. Another reason is given why this was holden not to be error; namely, that the fact did not appear upon the *postea;* and this seems to be the better reason: for the other, that, as the writing might have been given in evidence by the juror, it was lawful for him to show it to his fellows, does not seem to be conclusive.

Cro. Eliz. 616, Graves v. Short; ‖Bull. N. P. 308.‖ ☞ Though some of the jurors separated from their fellows, in a civil case, the verdict will not be set aside for this cause. Oram v. Fisher, 7 Halst. 153.☜

It is said in one book, that the jurors are not obliged to found their verdict entirely upon the evidence given in court; for that it may be in part founded upon their own personal knowledge. But no case is cited in support of this doctrine, and the contrary may be inferred from other books.

Vaugh. 147, Bushel's case.

It is in one book said, that if a witness named in a deed be returned of the jury, it is a good cause of challenge.

1 Inst. 151.

In another book it is said, that one of the jurors, after having heard all the other evidence, was, at the prayer of the defendant's counsel, sworn, and gave evidence in court; from whence it may be inferred, that he could not have given this evidence to his fellows after they were gone from the bar.

1 Sid. 133, Fitzjames v. Moys.

In another book it is said, that if a person returned to serve upon a jury know any thing relative to the matter in issue, it is his duty to tell the court so, that, instead of being sworn upon the jury, he may be examined as a witness.

7 Mod. 2, Anon.

It may, moreover, be inferred from the practice of granting a new trial because a verdict is contrary to evidence, that the jurors ought to found their verdict entirely upon the evidence given in court; for if they have a power to found it partly upon other evidence, it would be quite unreasonable for the judge before whom the cause was tried, who must always be a stranger to what did not pass in court, to report that a verdict is contrary to evidence, or for the court to set it aside as being so.

If a juror eat or drink at his own expense, before he and his fellows have agreed in a verdict, he is liable to be fined; but the verdict is good.

1 Inst. 227; Bro. *Verd.* pl. 19; Dyer, 218; 1 Ventr. 125; 12 Mod. 111.

After the jurors had been locked up together some time, the officer who attended them, being surprised at their delay in agreeing in a verdict, searched them, and found figs in the pockets of three, and pippins in the pockets of two others. This being represented to the judge, the three, who confessed the having eaten of the figs, were fined four pounds each; and the other two, notwithstanding they declared upon oath that they had not eaten of the pippins, were fined forty shillings each: but the verdict

was, upon conference with the judges of the other courts, holden to be good.

1 Leon. 132, Mounson v. West. βIn the United States, generally, the jurors are now allowed proper refreshments. See *Juries*, G, Vol. v. p. 369.ϐ

In a case of necessity, as if a juror be suddenly taken ill, it is in the power of the court to suffer him to eat and drink at his own expense, before he and his fellows have agreed in a verdict.

Ventr. 125.

If the trial of a cause be very long, it is at this day usual for the court, the consent(*a*) of both parties being first obtained, to give the jurors leave to eat and drink during the trial at their own expense, or at the equal expense of both parties.

[(*a*) In the late trials for treason, the jurors were permitted to eat, drink, and retire to rest, attended by proper officers, without requiring the formal consent of the parties. The irregularity was sufficiently justified by the necessity of the case.] {3 Dall. 515.} ‖But in The King v. Hardy, Sta. Tri. 24, 417, the court refused to allow them to separate even with the prisoner's assent; *aliter* in Eliz. Canning's case, Sta. Tri. 19, 671; and see Sta. Tri. 7, 500. And in The King v. Kinnear, the separation of the jury, without consent of the defendant, was held not to vitiate the verdict, there being no suspicion of any improper communication. 2 Barn. & A. 462; 1 Chitt. R. 401.‖

If the jurors eat or drink at the expense of one party, before they have agreed in a verdict, they are liable to be fined; and if the verdict be in favour of that party, it is bad; but if it be in favour of the other party it is good.

1 Inst. 227; 12 Mod. 111.

It is said in one book, that if the jurors, after they have agreed in a verdict, eat or drink at the expense of the party in whose favour it is, the verdict is good.

1 Inst. 227.

But it is in another book laid down, that the jurors can never be said to have agreed in a verdict, unless they have, by giving a privy verdict signified to the judge that they have agreed in one.

1 Ventr. 125.

It is said in two books, that although the jurors have given a privy verdict, they must not eat or drink without leave of the court until they have given a verdict in open court.

Bro. *Verd.* pl. 57; Moor, 33.

And it is in one of these said, that although the jurors may, with leave of the court, eat and drink after they have given a privy verdict, they must be kept together until they have given a verdict in open court.

Bro. *Verd.* pl. 57.

The jurors, having received their charge, withdrew to consider of a verdict. Before the rising of the court, they came into court to ask a question of the judge; which being answered, they again withdrew. At the sitting of the court in the afternoon of the same day, the judge was informed that two or three of the jurors were in court. Being asked by the judge what they did there, and having answered that they and their fellows could not agree in a verdict, they were ordered to go to their fellows. A verdict was afterwards given for the plaintiff, and the judge did not report that it was contrary to the evidence. The court being moved that this verdict might be set aside, it was holden to be good: and

by the court,—some of the jurors have been guilty of a great misbehaviour, and are liable to be fined; but, as the plaintiff has not been guilty of any misbehaviour, the verdict ought to stand.

Barnes, 441, Ld. St. John v. Abbot; {1 Penn. 278, Clarke v. Cole, *acc.*}

‖If the jurors do not agree in their verdict at the assizes before the judges are about to leave the town, though they are not to be threatened and imprisoned, the judges are not bound to wait for them, but may carry them round the circuit in a cart.

3 Black. Com. 376.

In a late case, however, where, after the trial of an issue out of Chancery, the jury were locked up for many hours, and not likely to agree, when the judge was about to leave the town, he took upon himself to discharge them of his own authority, the parties declining to consent: but if it had been a cause tried at *nisi prius*, between A and B, it seems the judge would have ordered them to follow him in a cart.

Morris v. Davies, 3 Carr. & Pa. 427.‖

The jurors being equally divided in opinion, threw dice for whom they should find a privy verdict, and found one for the party in whose favour the dice came; and without conferring afterwards together, they gave a verdict for the same party in open court. The verdict was set aside: and by the court,—As our estates, liberties, and lives are in the power of jurors, they ought to be very circumspect in their conduct. In this case the jurors have behaved very improperly, for they were determined by chance in the finding of their privy verdict; and they had not any conference together afterwards, before they gave their verdict in open court.

1 Freem. 415, Ld. Fitzwalter's case. βSee *Trial*, (L.)ϐ

β In a case where each of the jurors set down the sum he thought proper for damages, the whole was added together, and then divided by twelve, and the quotient returned as the verdict of the jury. Held, to be irregu lar, and the verdict was set aside.

Harvey v. Rickett, 15 Johns. 87. But see *Trial*, (L), *contrà*.ϐ

The jurors, who could not agree in a verdict, drew lots for whom they should find one, and found one for the party in whose favour the lot was. The verdict was set aside; and the jurors were ordered to appear in court.

2 Lev. 205, Foster v. Hawden.

Another verdict was for the same reason set aside, notwithstanding the judge reported, that the party, in whose favour it was, ought in his opinion to have had a verdict.

Stra. 642, Hale v. Cove. ‖Vide *suprà*, tit. *Trial*, Vol. ix. p. 588, 613.‖

A verdict was set aside, because the jurors were determined as to the damages they should give by throwing up cross or pile, whether they should give five hundred pounds or three hundred.

Bunb. 51, Mellish v. Arnold.

If the jurors who cannot agree in a verdict vote, and give a verdict according to the greater number of votes, the verdict is nevertheless good.

Comb. 14, Anon.

In a modern case wherein the jurors voted for a verdict, seven of them were for finding a verdict as it was found, and no objection was made by the other five when the verdict was given. The court refused to set aside

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the verdict: and by Lee, C. J.—Nothing was in this case determined by chance. The five jurors might ultimately be convinced by the seven: but, if they only acquiesced in the finding of the verdict, that is sufficient; and they shall not now be received to say that they did not acquiesce.

Sayer, 100, Lawrence v. Boswell.

A verdict was set aside upon an affidavit of eleven of the jurors, that they and the other juror had agreed to give a verdict for the plaintiff; but that the foreman had given a verdict for the defendant.

Ca. of Pr. in C. B. 66, Miles v. Baker; ‖Burr. 383. But that the court cannot receive such affidavits, see Owen v. Warburton, 1 New R. 329; and see 2 Stark. 111; 8 Taunt. 26; 3 Bro. & Bing. 272; 7 Moo. 87, and tit. *Trial*, Vol. ix. 588, 613.‖ β Brewer v. Thompson, Coxe, 32.ℊ

It is said that a misbehaviour in one or more of the jurors cannot be assigned for error, unless the misbehaviour appear upon the *postea*, if the cause were tried at *nisi prius*, or upon the record, if it were tried at bar; for that, if a misbehaviour not appearing on record could be taken advantage of by writ of error, a verdict might at a great distance of time be set aside, when, by reason of the death of one of the parties, or of one or more of the jurors, the truth of the misbehaviour suggested could not be properly inquired into.

Cro. Eliz. 616, Graves v. Short; ‖Bull. N. P. 308.‖

It is laid down in two cases, that the court will not set aside a verdict for misbehaviour in one or more of the jurors, unless the misbehaviour appear upon the *postea*, if the cause were tried at *nisi prius*, or upon the record, if it were tried at bar.

Cro. Eliz. 189, Medcalf v. Dean, Trin. 32 Eliz.; Cro. Eliz. 411, Vicary v. Farthing, Mich. 37 Eliz.

But the court in a subsequent case set aside the verdict, upon an affidavit that the jurors had eaten at the expense of the party in whose favour it was given, before they had agreed in the verdict.

1 Freem. 79, Bellamy v. Player, Pasch. 23 Car. 2. ‖*Sed* vide *suprà*.‖

In another subsequent case the court set aside a verdict, upon an affidavit of the officer who attended the jurors, that they had tossed up cross and pile for whom they should find the verdict, and had found one accordingly.

2 Jon. 83, Fry v. Hardy, Mich. 29 Car. 2.

‖The court will not receive an affidavit of partiality and prejudice in one of the jurymen from the unsuccessful party.

7 Price, 203; 11 Price, 383.‖

βA verdict will not be set aside on account of the misbehaviour of a juror towards the court, unless it is prejudicial to one of the parties.

Crane v. Sayre, 1 Halst. 110; Board v. Cronk, 1 Halst. 119.ℊ

(I) In what Cases a verdict is bad, on account of a Misbehaviour in one of the Parties.

If one of the parties speak words of mere civility to one of the jurors, before they have agreed in a verdict, the verdict. although it be in favour of such party, is good.

1 Ventr. 125, Duke of Richmond v. Wise; 2 Roll. Abr. 716, pl. 17.

If one of the parties say these words to one of the jurors, before they have agreed in a verdict, *the matter is clearly of my side*, or these words,

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I hope you will find for me, the verdict, if it be in favour of such party, is bad; but if it be in favour of the other party, it is good.

1 Ventr. 125, Duke of Richmond v. Wise; 2 Roll. Abr. 716, pl. 17.

‖Merely desiring a juror to appear, is no ground for setting aside a verdict. But where it was sworn that handbills, reflecting on the plaintiff's character, had been distributed in court, and shown to the jury, on the day of trial, the court granted a new trial, and would not receive from the jury affidavits in contradiction, although the defendant denied all knowledge of the handbills.

1 Stra. 643, Coster v. Merest; 3 Bro. & Bing. 272.‖

If one of the parties or his agent deliver to the jurors, before they have agreed in a verdict, a writing relative to the matter in issue which was not given in evidence, the verdict if it be in favour of such party, is bad; but if it be in favour of the other party, it is good.

1 Inst. 227.

If one of the parties, or his agent, without leave of the court, deliver to the jurors, before they have agreed in a verdict, a writing sealed or not sealed, which was given in evidence, the verdict, if it be in favour of such party, is bad; but if it be in favour of the other party, it is good.

1 Inst. 227.

And it is said, that the verdict, if it be in favour of the party who delivered the writing, is bad, notwithstanding the jurors afterwards declare upon oath, that they never read the writing; for that it would be of the most dangerous consequence, if the jurors should be suffered to receive a writing privately from one of the parties.

2 Roll. Abr. 714, pl. 6.

After the jurors were gone from the bar, but before they had agreed in a verdict, the plaintiff's attorney delivered to them a book which had been given in evidence. A verdict being afterwards found for the plaintiff, Fenner, J., was, upon a motion to set it aside, of opinion, that, as the verdict was in favour of the party in behalf of whom the book was delivered, it was bad. The reporter adds, that the cause was adjourned; and that there was afterwards judgment for the plaintiff.

Cro. Eliz. 411, Vicary v. Farthing; β Jessup v. Eldridge, Coxe. 401.ℊ

In another report of the same case it is said, that Clinch, J., as well as Fenner, J., was of opinion that the verdict was bad; and if so, notwithstanding the plaintiff had judgment, which followed of course, as the court was equally divided, this case does not contradict what is laid down in the books above cited.

Moor, 452.

‖When the jury have withdrawn, after the case has been summed up to them, the court will not permit them to see a treatise on the law of the subject, even with consent of the parties. They should state their difficulty to the judge, and receive his direction as to the law.

Burrows v. Unwin, 3 Car. & P. 310, *per* Ld. Tenterden, C. J.‖

β If a person claiming under the same title with a party, in his presence, though without any interference by him, endeavour to prejudice a jury in favour of his title, a verdict for him will be set aside.

Chews v. Driver, Coxe, 166.ℊ

(K) Of a Verdict upon an informal or immaterial Issue.

If an issue be joined upon a point so material, that the determination thereof will determine the matter in question, but be not joined properly, this is an informal issue.

An issue, which would have been bad upon a demurrer, by reason of informality, is after a verdict helped by the 32 H. 8, c. 30, the joining of issue being one of the things mentioned in that statute.

In an action of prohibition to a suit for tithes, the plaintiff alleged a prescription for all the parishioners to clip the wool from the necks of their sheep in order to preserve them, and that, in consideration of paying the tenth fleece when the sheep should be sheared, they had been used to be discharged of the tithe of the wool so clipped from the necks of their sheep. The defendant traversed the prescription in this matter, *absque hoc*, that, in consideration of paying the tenth fleece when their sheep should be sheared, they had been used to be discharged of the tithe of the wool so clipped from the necks of their sheep. Issue being joined upon the traverse, and a verdict being found for the defendant, the court was moved, that a consultation ought not to be awarded, because the issue is not well joined. A consultation was awarded: and by the court,—Although the issue be not aptly joined, it is after a verdict helped by the statute.

Cro. Ja. 576, Jouce v. Parker.

|| Where, to an avowry for 120*l.* rent, the plaintiff pleaded in bar that the said 120*l.* was not due, and the defendant joined issue thereon, and at the trial it appeared that only 24*l.* was due, upon which the plaintiff objected that the evidence did not support the issue joined by the defendant, and the defendant took a verdict for the 24*l.*, subject to the opinion of the court, the verdict was held to cure the informality of the issue.

Cobb v. Bryan, 3 Bos. & Pul. 348.||

In an action of replevin the defendant avowed the taking as a distress for rent in arrear, which he claimed under a grant of a rent-charge from J N the heir of E N, who was seised in fee of the land. The plaintiff replied, the E N was seised of an estate-tail, and that upon the death of J N her son became entitled to the land, and that upon his death it descended upon the plaintiff; and he traversed the seisin of E N in fee. Issue being joined upon the traverse, and a verdict being found for the defendant, it was said upon a motion in arrest of judgment, that the issue is immaterial; for that, as it is not material how the ancestor of the grantor of the rent-charge was seised, but how the grantor was himself seised, the traverse ought to have been upon the seisin in fee of the grantor. Judgment was given for the defendant: and by the court,—As the defendant has alleged a seisin in fee in E N, her seisin in fee is material, and, consequently, was traversable; so that, although this be not so apt an issue as might have been joined, it is after a verdict helped by the statute.

Cro. Ja. 44, Pigot v. Pigot.

In an action of *assumpsit* the defendant pleaded not guilty. Issue being joined upon the plea, a verdict was found for the plaintiff. Upon a motion in arrest of judgment it was said, that the issue is immaterial; but judgment was given for the plaintiff: and by the court,—Although this be not the most proper issue, and would have been bad upon a demurrer, yet, as deceit is charged in the declaration in an action of *assumpsit*, the plea of not guilty is such an answer thereto, that the issue joined upon it is

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after a verdict helped by the statute. Walmsley, J., added—That there are many precedents, in which an issue joined in an action of *assumpsit* upon the plea of not guilty has been tried, and judgment has been given.

Cro. Eliz. 470, Corbyn v. Brown; {1 Hen. & Mun. 153, Huncicutt v. Carsley, S. P., where *not guilty* was pleaded in *covenant*.}

{If to an avowry for 120*l.* rent in arrear the plaintiff plead "that the said 120*l.* is not due," and the defendant join issue thereon, and at the trial it appears that 24*l.* only is due, upon which the plaintiff objects that the evidence does not support the issue joined by the defendant; yet if a verdict be taken for 24*l.*, *subject to the opinion of the court*, such finding will cure the defect in the formality of the issue. The substance of the issue (which was to ascertain whether any rent was in arrear) is rightly found, and therefore any informality in the issue shall not be regarded.

3 Bos. & Pul. 348, Cobb v. Bryan.}

If an issue be joined upon a point so immaterial that the determination thereof will not determine the matter in question, this is an immaterial issue.

An immaterial issue is not helped by any of the statutes of jeofails.

Carth. 371; 1 Lev. 32; ‖2 Will. Saund. 319; and see tit. *Pleas* and *Pleadings*, (M).‖

In an action of trespass the defendant pleaded an accord betwixt J S and the plaintiff of the one part, and himself of the other. The plaintiff replied, that no accord was made betwixt the defendant and him. Issue being joined upon this replication, and a verdict being found for the plaintiff, it was holden, that no judgment could be given by reason of the immateriality of the issue; it not being joined upon the accord pleaded by the defendant, but upon a different accord.

1 Roll. R. 86, Carpenter v. Starr.

In an action of trover against husband and wife, which charged a conversion by the wife, both the defendants pleaded not guilty. Issue being joined upon the plea, and a general verdict being found for the plaintiff, a repleader was awarded: and by the court,—If judgment should be given for the plaintiff, it would amount to saying, that the husband and wife were both guilty of the conversion; whereas the plaintiff only charges that the wife was guilty thereof.

Cro. Ja. 5, Coxe v. Croswell.

In an action of trover the defendant pleaded *non assumpsit*. Issue being joined upon the plea, and a verdict found for the plaintiff, a repleader was awarded on account of the immateriality of the issue.

Ca. of Pr. in C. B., Noble v. Lancaster; Barnes, 125, S. C.

In an action of trespass *quare clausum fregit* the defendant pleaded, that the place in which the trespass is charged is his land. The plaintiff replied, that the place in which the trespass is charged is his land, and not the land of the defendant. Issue being joined upon the replication, a verdict was found for the plaintiff. Upon a motion in arrest of judgment it was said, that the issue is immaterial; for that the place in which the trespass is charged may be the estate of the plaintiff, and yet he may not be in the possession thereof, which he must be in order to maintain this action. The plaintiff had judgment: and by the court,—It is found, that the place in which the trespass is charged is the land of the plaintiff; and we will,

after a verdict, rather intend that he was in the possession thereof than that he was not.

2 Stra. 973, Cory v. Hinton. ‖This general plea of *liberum tenementum* is contrary to a principle in pleading, that every plea should contain a direct and positive answer to the declaration, so as to bar the action if true in fact. See 1 Will. Saund. 299 e; and Strange, in argument in the principal case, admitted that both the plea and replication would have been bad on demurrer. And in Lambert v. Strother, Willes's R. 222, Willes, C. J., thought the plea was confined to those cases where it is used as the common bar only; but where the declaration ascertains the place, he thought it could not be supported; and see Cocker v. Crompton, 1 Barn. & C. 489, *acc.*‖

In an action of debt upon a single bill the defendant pleaded payment of the money due thereupon; but did not plead an acquittance. Issue being joined upon the plea, a verdict was found for the plaintiff, and judgment was given for him. A writ of error being brought in the Exchequer Chamber, it was assigned for error, that, as the payment of the money due upon a single bill is no discharge of the bill, unless there be an acquittance, the issue is immaterial. The judgment was affirmed: and by the court,—If the verdict had been for the defendant, it would perhaps have been bad, because an acquittance could not upon this issue have been found; but, as the verdict finds that the money due upon the bill is not paid, it virtually finds that the bill is not discharged; and the court will never suffer a defendant to avail himself of his own bad pleading, in order to deprive a plaintiff of the benefit of a verdict, upon which judgment may be well given.

5 Rep, 43, Nichol's case; Moor, 692, S. C.

In an action of *ejectione firmæ* the defendant pleaded, that J S, being seised in fee of the premises, demised them to him for the term of five years; that by virtue of this demise the defendant entered, and was possessed, until the plaintiff's lessor disseised him; that the plaintiff's lessor, being seised of the premises by the disseisin, demised the same to the plaintiff; and that the defendant entered upon the plaintiff, as it was lawful for him to do: the plaintiff replied, that his lessor was seised in fee, and traversed the disseisin of the defendant. Issue being joined upon the replication, a verdict was found for the plaintiff. Upon a motion in arrest of judgment it was said that, as the defendant was by his own showing only a termor, he could not be disseised, and, consequently, that, the issue being immaterial, no judgment could be given upon the verdict. Judgment was given for the plaintiff; and by the court,—If a verdict had been found for the defendant, it would have been bad; because it would have found a disseisin of a termor; but as the verdict is for the plaintiff, judgment may be well given; because it only finds that his lessor did not disseise the defendant; and the court will never suffer one party, if consistently with the rules of law it can be prevented, to avail himself of his own bad pleading, in order to deprive the other of the benefit of a verdict.

Cro. Ja. 678, Johns v, Ridler.

In an action of replevin the defendant avowed the taking as a distress for an arrear of rent, due to him under a demise from the plaintiff made at A, dated 1 Nov., 18 Car. 2. The plaintiff replied, that he did not make a demise to the defendant at A, dated 1 Nov., 18 Car. 2, in manner and form as alleged.(*a*) Issue being joined upon the replication, the jury found a verdict for the plaintiff, and judgment was given for him.

(L) Of a Verdict upon an Issue, &c.

A writ of error being brought, it was assigned for error, that the issue is immaterial; because it only is, whether a demise was made by the plaintiff to the defendant at a place certain, and upon a day certain: whereas, a demise at any other place, and upon any other day, would have been sufficient to have warranted the distress of the defendant. It was moreover said, that as the merits, namely, whether there was a sufficient demise to warrant the distress, had not been tried; and as the trial thereof had been prevented by the bad pleading of the plaintiff, who has by the replication made the place and day of the demise material, neither of which is in such case material, he ought not to have judgment. On the other side, it was said, that this is at most only a misjoining of issue, which is after a verdict helped by the statute of jeofails.

2 Lev. 11, Holbech v. Bennett; 2 Saund. 317, S. C. ‖(*a*) The plea in bar should have been "that he did not demise in manner and form as," &c., and the issue, "that he did demise," &c.; for the day and place were quite immaterial.‖

The opinion of the court was, that this case is not within the statute of jeofails; (*a*) and that, as the merits have not been tried, the plaintiff was not entitled to judgment upon the verdict; but as it appeared that the avowry of the defendant was bad, it was holden the plaintiff was entitled to judgment upon the declaration which is good; and the judgment was affirmed.

‖As to the award of a repleader on an immaterial issue, see tit. *Pleas and Pleading*, (M), Vol. vii. p. 658; and see 2 Will. Saund. 319; Stephen on Plead. 119. (*a*) But Hate, C. J., was of opinion, that the issue and verdict were aided by the statute of jeofails. 2 Saund. 319. And Serjeant Williams is clearly of the same opinion, as it was an *informal* issue. 2 Will. Saund. 319, note (6,) (5th edit.)‖

‖Where the avowant in replevin took down the record to trial, without adding the *similiter* to the conclusion of the plea in bar, and obtained a verdict, the Court of C. B. set it aside without costs.

Griffith v. Crockford, 3 Bro. & Bing. 1; *sed* vide Sayer v. Pocock, Cowp. 407; Grundy v. Mell, 1 New R. 28.‖

β In general, when a verdict does not conclude formally in the words of the issue, yet if the point in issue can be collected from the finding, the court will put the verdict into form, and make it serve according to the justice of the case.

Porter v. Rummery, 10 Mass. 64.

A special verdict in ejectment referred the construction of a deed, and other evidences of title, to the court, but they were not made a part of the record. The court held, that the verdict was too imperfect to render a judgment on it, although there was a deed on record, forming part of a bill of exceptions taken to the opinion of the court, on a motion made for a new trial.

M'Arthur v. Porter's Lessee, 1 Pet. 626.

When the issue is an immaterial one, the verdict ought to be set aside.

Woods v. Hynes, 1 Scam. 105.γ

(L) Of a Verdict upon an Issue, Part of which is insensible or insufficient.

If part of an issue be insensible, the verdict thereupon found, notwithstanding it be a general one, is good; for the court will not intend that part of the damages was given for the insensible part. On the contrary, the court will, in support of the verdict, intend that no damages were given for that part.

Carth. 131, Nightingale v. Bridges, Salk. 364.

(M) Of a Verdict which does not find all that is in Issue.

In an action of *assumpsit*, the plaintiff declared upon the custom of merchants, for money due upon a promissory note; and he likewise declared upon an *indebitatus assumpsit*. Issue was joined upon the plea of *non assumpsit*, and a general verdict was found for the plaintiff. It being upon a motion in arrest of judgment holden, that a promissory note is not within the custom of merchants, it was insisted, that the court may after a verdict intend, that no damages were given on account of the note. The judgment was arrested: and by the court,—As the note is not matter insensible, but matter insufficient in law, the court must intend that part of the damages was given on account thereof; and if it was given the verdict is bad.(*a*)

Salk. 129, 364, Clark v. Martin. ‖This was before the stat. 3 & 4 Ann. c. 9.‖ [(*a*) This inconvenient and ill-founded rule, that where there are several counts, entire damages, and one count is bad, and the others are not, this shall be fatal, upon the fictitious reasoning delivered in the text, is now fully settled in civil cases; though it does not hold in the case of criminal prosecutions; for when there is a general verdict of *guilty* in an indictment consisting of several counts, if any one of them is good, that is held to be sufficient. Grant v. Astle, Dougl. 730; {1 Johns. Rep. 322. The People v. Curling.} However, though this distinction has been made in civil cases, yet if there was only evidence at the trial upon such of the counts, as were good, and consistent, a general verdict may be altered from the notes of the judge, and entered only on those counts; but if there is *any* evidence, which applied to the other bad or inconsistent counts, (as, for instance, in an action for words, where some actionable words are laid, and others not actionable, ‖in separate counts,‖ and evidence given of both sets of words, and a general verdict,) there the *postea* cannot be amended, because it would be impossible for the judge to say on which of the counts the jury had found the damages, or how they had apportioned them. In such a case the only remedy is by awarding a *venire de novo*. Eddowes v. Hopkins, Dougl. 377;] {5 Johns. Rep. 430, Cheetham v. Tillotson; Ibid. 476, Backus v. Richardson.} ‖*Aliter* where the actionable words, and those not actionable, are in the same count. See Willes, 443; 2 Will. Saund. 171 b, c. (5th edit.); Tidd's Prac. 919, 922, (9th edit.) The application to amend the verdict by the judge's notes, must be made in reasonable time. 1 Barn. & A. 161, Harrison v. King; and to the judge who tried the cause, not to the court. 1 Chit. R. 283.‖

β In an action of trespass *de bonis asportatis*, the plaintiff pleaded property in A B and not in the plaintiff, and justified as deputy-sheriff; replication *de sua injuria*, and traversing that the property was in A B; rejoinder that it was in A B; issue and verdict of guilty. Held, that the verdict was argumentative, but whether it was amendable, or cured by the statute of jeofail, *quære*.

Gerrish v. Train, 3 Pick. 124.g

(M) Of a Verdict which does not find all that is in Issue.

If a verdict only find part of what is in issue it is bad; because the jury have failed in their duty, which was to find all that is in issue.

1 Inst. 227; {1 Day, 189, Smith v. Raymond.}

In an information for intruding into a messuage and a hundred acres of land, issue was joined upon the plea of not guilty; the jurors found for the plaintiff as to the land, but were silent as to the messuage. The verdict was holden to be bad.

1 Inst. 227.

In an action of debt the plaintiff declared for seven pounds. The defendant pleaded *nil debet*, and issue was joined upon the plea. The jury found that the defendant owed the plaintiff six pounds, but were silent as

(M) Of a verdict which does not find all that is in Issue.

to the seventh pound. The verdict was upon a writ of error holden to be bad.

Cro. Eliz. 133, Finnymore v. Stanley.

βWhen a verdict decisive of the case is found on one or more of several issues, and the jury cannot agree as to one other issue, the party in whose favour the verdict is found may waive the other issue, or consent that a verdict be entered on it against him.

Sutton v. Dana, 1 Metc. 383.β

In an action of trespass the plaintiff declared for the breaking of his close, for the beating of his servant, and for the carrying away of his goods. The defendant pleaded not guilty, and issue was joined upon the plea. The jury found the defendant guilty of breaking the close, but were silent as to the beating of the servant and the carrying away of the goods. The verdict was holden upon a motion in arrest of judgment to be bad, because it does not find all that is in the issue, and a *venire facias de novo* was awarded.

3 Leon. 82, Rosse's case.

The declaration in an action of trespass brought by *baron* and *feme* charged the beating of both. The defendant pleaded not guilty, and issue was joined upon the plea. The jury found the defendant guilty of beating the *feme*, but were silent as to the beating of the *baron*. Upon a motion in arrest of judgment the verdict was holden to be bad, because it does not find all that is in issue, and a *venire facias de novo* was awarded.

Hardr. 166, Rochel and his Wife v. Steedle.

If in an indictment for privately conveying ducats into the prosecutor's pocket, with an intent to charge him with a robbery, the jury found the defendant guilty of the fact, but are silent as to the intent, no judgment can be given, the verdict being incomplete.

Sayer, 36, Rex v. Simons.

In an action of debt upon a charter-party, by which the defendant had contracted to pay fifty guineas a month for the use of a ship, the plaintiff alleged, that five hundred pounds were due to him for the use of the ship for a time therein mentioned. The defendant pleaded, that he had paid the plaintiff, at the rate of fifty guineas a month, for all the time he had had the use of the ship. Issue being joined upon the plea, the jury found, that three hundred pounds were due to the plaintiff for the use of the ship; but were silent as to the residue of the five hundred pounds. Upon a writ of error it was assigned for error, that the verdict does not find all that is in issue. In support of the verdict it was said, that, as the issue is special, and the jury have ascertained what is upon the whole due to the plaintiff for the use of the ship, no other action can be brought for the use thereof, for any part of the time mentioned in the declaration. The judgment was reversed: and by the court,—There is no difference, as to the question before the court, betwixt the case of a verdict upon a special issue, and that of a verdict upon a general issue; for the jury must in either case find all that is in issue.

Stra. 1089, Hooper v. Shepherd.

‖Where several pleas were pleaded to an action of debt on bond, and issues were taken on them, and as to some of them the jury found no verdict, the court awarded a *venire de novo*.

Hick v. Keats, 4 Barn. & C. 69.‖

(M) Of a Verdict which does not find all that is in Issue.

If there are several counts in a declaration, and the verdict is taken upon only one of the counts, it is good, provided all that is in issue upon that count be found, because every count is to be considered as a distinct declaration.

Salk. 133, Hill v. Lewis; 1 Ventr. 27; 12 Mod. 5.

If a verdict find all that is in issue in one count, which is material, it is good; for, if any thing not material be put in issue, the verdict is good, notwithstanding it be silent as to that.

1 Inst. 227.

In an action of debt, for the penalty given for not having set out tithes, the plaintiff declared upon a lease from J S, of the tithes of the parish of A, for the term of six years, in case J S should so long live, *and continue to be parson of the parish of A.* The defendant pleaded *nil debet*, and issue was joined upon the plea. The jury found a lease from J S, of the tithes of the parish of A, for the term of six years, in case J S should so long live; but they found likewise, that the words *and continue to be parson of the parish of A* were not contained in the lease. Haughton, J., was of opinion, that the plaintiff ought not to have judgment; but the other justices were of a different opinion: and by them,—The lease found is in substance the same as that which is in issue; for, although the words *and continue to be parson of the parish of A*, are not contained in the lease, they are implied therein. It was moreover said, that the lease is only matter of inducement, the not having set out the tithes being the gist of the action; for which reason, as enough is found to show that the tithes were not set out, and that the plaintiff had a right thereto, he ought to have judgment.

Cro. Ja. 328, Wheeler v. Haydon; ‖ Gwill. Tyth. Ca. 258; Eag. & Y. 219.‖

In an indictment which contained three counts, the first count charged the forging of a certain bond; the second charged the publishing of the forged bond by the defendant; the third charged the publishing of a bond, knowing it to have been forged. The jury found that it was proved that the defendant did forge the bond set out in the indictment, and that he did publish the same; and then, without saying any thing as to the fact charged in the third count, they concluded with saying, that if upon this evidence the court shall be of opinion that the defendant is guilty of the fact charged, then they find him guilty; but if the court shall be of opinion that he is not guilty thereof, then they find him not guilty. It was said for the defendant, that this verdict is bad; because it does not find all that is in issue. It was holden, that the court is not in this case bound by the conclusion of the jury; but that, upon what is found to have been proved, it is the duty of the court to adjudge the defendant guilty of the forging and the publication charged in the two first counts, and not guilty as to the residue; and judgment was given accordingly.

Stra. 844, 845, Rex v. Hayes.

It is said that the court will never award a *venire facias de novo* in an indictment for a capital offence; although a material fact be not found by the verdict. It is likewise said, that if the facts found be not sufficient to warrant a judgment against the defendant in an indictment for a capital offence, the court will, provided a verdict be sufficient to found

(N) Of a Verdict which finds a Thing that is not in Issue.

a judgment upon, give judgment for him; for, that no man's life ought to be twice in jeopardy for the same offence.

Stra. 387, Rex v. Huggins. ‖ See 5 Term R. 454.‖

βIn Pennsylvania, when there are several issues, a general finding for the plaintiff is considered as equivalent to an express negative to each plea.

Strohecker v. Drinkle, 16 S. & R. 38.

A jury must pass on all the matters submitted to them, and cannot find a verdict on a part of the plaintiff's demand without deciding the other.

Brochway v. Kinney, 2 Johns. 210; Van Benthuysen v. De Witt, 4 Johns. 213.g

(N) Of a Verdict which finds a Thing that is not in Issue.

A VERDICT is not bad on account of its finding a thing that is not in issue, it being a maxim, that *utile per inutile not vitiatur;* and the court will, in giving judgment, reject that part of the verdict which relates to the thing not in issue as surplusage; inasmuch as the jury had nothing to do therewith.

1 Inst. 227.

If the matter in issue be, whether there are assets, and the jury find that there are assets *beyond the seas*, the verdict is nevertheless good; for the court will, in giving judgment, reject the words *beyond the seas* as surplusage.

6 Rep. 57, Dowdale's case, Cro. Ja. 55.

If the matter in issue be, whether J S died seised of certain premises, and the jury, after finding that he did die seised thereof, find that *continual claim* has, since the death of J S, been made by J N, the verdict is nevertheless good; for the court, in giving judgment, will not pay any regard to what is found concerning the *continual claim.*

Bro. *Nugat.* pl. 25; Bro. *Verd.* pl. 68.

If in an action upon the case for words, the jury, after finding that the defendant spoke the words in issue, find that he spoke *other slanderous words*, the verdict is nevertheless good; for the court will, in giving judgment, reject the finding of the *other slanderous words* as surplusage.

Cro. Ja. 407, Sidenham v. Man; 2 Roll. Abr. 717, pl. 4.

In an action of *scire facias* against the executor of J S, the matter in issue was, whether J S had been taken in execution by virtue of a *capias ad satisfaciendum* set out in the declaration, which issued upon a judgment obtained by the plaintiff against J S. The jury found, that J S was not taken in execution by virtue of the *capias ad satisfaciendum* set out in the declaration, but that he was taken in execution by virtue of an *alias capias ad satisfaciendum* which issued upon the judgment. This was holden to be a verdict for the plaintiff: And by the court,—As it is found that J S was taken in execution by virtue of a *capias ad satisfaciendum* which issued upon the judgment, the word *alias*, which only shows the particular species of *capias ad satisfaciendum*, ought to be rejected as surplusage.

Hob. 53, 54, Foster v. Jackson.

In an action of *assumpsit*, the jury found a verdict for the plaintiff, and, after assessing damages to the amount of thirty pounds, added the following words, *the damages to be paid in dyeing, if by law they may be so paid.* These words being omitted in the judgment, a writ of error was brought,

and the omission was assigned for error. The judgment was affirmed: And by the court,—As the verdict which finds for the plaintiff and assesses damages is a complete verdict, what is added *as to the manner of paying the damages* is nugatory, and being so it is very properly omitted in the judgment.

Cro. Car. 219, Taylor v. Willes.

After an indictment found at an assize had been moved by *certiorari* into the King's Bench, the defendant pleaded not guilty, and issue was joined upon the plea by the king's coroner. The jury found the defendant guilty of the premises, *prout* the *coroner has complained against him.* Upon a motion in arrest of judgment it was said that the verdict was bad, because as the indictment was found at an assize, *the coroner has not complained against the defendant;* and that the fault is not cured by any of the statutes of jeofails. The verdict was holden to be good: And by the court,—The verdict which finds the defendant guilty of the premises is complete, and, consequently, as that which follows *concerning the complaint of the coroner* ought to be rejected as surplusage,(*a*) it will not want the help of any of the statutes of jeofails.

2 Saund. 308, Rex v. Urlyn. ‖(*a*) As to rejecting matter as surplusage, see *Pleas and Pleadings*, (I) 4, in Vol. vii.‖

Upon an issue directed out of the Court of Chancery, the jury found a verdict in the following words. Our verdict is, that the defendant did not assume to the plaintiff in manner and form as in the record is supposed; but notwithstanding this, if the two witnesses, J S and J N, have testified the truth, as we think they have, then we find, that the defendant did assume to reassure to the plaintiff so much of the land mentioned in the record as the defendant had bought of the plaintiff, upon the payment of two hundred and fifty pounds by the plaintiff to the defendant within three years after the assumption: and if the court shall think so, we find for the plaintiff, and assess damages to the amount of twenty pounds, and costs to the amount of four pounds. The verdict was decreed by the Chancellor to be a verdict for the defendant; and Dyer, J., and Ayloffe, J., whom he called to his assistance; and the counsel for both parties were satisfied with the decree.

Dyer, 372, Heyward's case.

If a verdict, after finding the matter in issue, find a thing which might have been pleaded in abatement, as *joint-tenancy*, the verdict is good; for, as the defendant did not avail himself of the *joint-tenancy*, by pleading it in abatement, the court will reject it as surplusage.

Bro. *Nugat.* pl. 27.

In an action of waste, the plaintiff declared, that the defendant, being seised in fee of the premises on which the waste was committed, had enfeoffed J S to the use of the defendant for life, with remainder to the plaintiff in fee. The defendant pleaded, that the feoffment was to the use of himself in fee, *absque hoc*, that it was to the use of himself for life, with remainder to the plaintiff in fee. Issue being joined upon the plea, the jury found, that the feoffment was to the uses mentioned by the plaintiff: but they found further, that the estate for life reserved to the defendant *was without impeachment of waste;* and submitted it to the court whether the plaintiff ought to have judgment. Wyndham, J., was of opinion, that the plaintiff ought to have judgment; inasmuch as it appeareth, from

(O) Of a Verdict which varies from the Issue.

what is found by the verdict, that he had no cause of action. But Anderson, C. J., Rhodes, J., and Perriam, J., were of opinion, that the plaintiff ought to have judgment; and by Anderson, C. J., the matter in issue is found for the plaintiff; and as the defendant did not avail himself *of the privilege of being dispunishable of waste*, by pleading it, the jury, it not being in issue, had nothing to do therewith; for which reason that which is found concerning it ought to be rejected as surplusage.

3 Leon. 80, Pepy's case.

In an action of *assumpsit* against an executor, the plaintiff declared upon a promise of the defendant's testator. Issue being joined upon the plea of *non assumpsit*, the jury found for the plaintiff: but they likewise found, *that the testator was dead before the day on which the promise is alleged to have been made.* The verdict was holden to be good: And by the court,—As the jury have found for the plaintiff, their finding, *that the testator was dead before the day on which the promise is alleged to have been made*, ought to be rejected as surplusage.

Cro. Car. 130, Inkersalls v. Sams.

β A verdict which contradicts the facts admitted in the pleadings, is to be disregarded.

M'Ferran v. Taylor, 3 Cranch, 280.β

(O) Of a Verdict which varies from the Issue.

A VERDICT which varies from the issue in a matter of substance is bad

What is such a variance betwixt a verdict and the issue as will make the verdict bad, is best to be learned from considering the determinations upon the point, the principal of which in divers actions shall be mentioned.

1. *In an Action of Assumpsit.*

The plaintiff in an action of *assumpsit* declared upon a contract by two persons. Issue being joined upon the plea of *non assumpsit*, the jury found that the contract was made by only one of the persons. This was holden to be a verdict for the defendant; the contract found being different from that which is an issue.

2 Roll. Abr. 707, pl. 49.

The plaintiff in an action of *assumpsit* declared upon a promise by four persons. The defendants all joined in the plea of *non assumpserunt infra sex annos*, and issue was thereupon joined. The jury found, that one of the defendants had promised within six years; but they likewise found, that the other three had not. It was holden, that, as the jury had not found the promise which was in issue, the verdict was for the defendants.

2 Ventr. 151, Bland v. Haselrig and others. ‖But see Whitcomb v. Whiting, Doug. 652; 2 Will. Saund. 64.‖

In an action of *assumpsit*, the defendant, an administrator, pleaded, that three judgments had been obtained against him as administrator to J S, that those judgments are still in force, and that he has assets in his hands only to the value of five shillings, which are liable to those judgments. The plaintiff replied, that those judgments are kept in force by fraud, and issue was joined upon the replication. The jury found that one of those judgments was kept in force by fraud. The verdict was holden to be for the

plaintiff: And by the court,—As the defendant's plea is found to be false as to part, the plaintiff ought to have judgment.

Carth. 196, Beake v. Kent. ‖See 1 Will. Saund. 334, 335, 337; 2 Chit. on Plead. 637.‖

In an action of *assumpsit* the plaintiff declared, that the defendant was indebted to him in the sum of twenty pounds, which he promised to pay upon request. The defendant having pleaded *non assumpsit*, the jury found that the defendant was indebted to the plaintiff in the sum of ten pounds upon one account, and in the sum of ten pounds upon another. The verdict was holden to be bad; because, as the issue is joined upon one promise, and the jury have found two promises, the variance is in a matter of substance.

2 Roll. Abr. 719, pl. 18.

In an action of *assumpsit*, it was alleged in the declaration, that the defendant, in consideration that the plaintiff would give credit for certain goods to J S, promised to pay for the same, when he should, after the delivery of any goods, be requested so to do. The defendant pleaded *non assumpsit*, and issue was joined upon the plea. The jury found, that the defendant did promise to pay for the goods, but they did not find that a request of payment had been made to him after the delivery of the goods. The verdict was holden to be bad: And by the court,—As the duty could not in this case arise until a request was made, the request is material, and, consequently, as this is not found, the verdict is bad.

Brownl. 13, Gore v. Colethorpe; ‖Cro. Eliz. 85, 91; 2 H. Blac. 131; 1 Stra. 89; Carter v. Ring, 3 Camp. R. 459.‖

It has been heretofore holden, that if the plaintiff in an action of *assumpsit* declare upon an *indebitatus assumpsit*, he cannot recover a less sum than he declares for. In an action of *assumpsit* the plaintiff declared, that the defendant was indebted to him in the sum of fifty pounds, which he promised to pay. The jury found, that as to forty-seven pounds, parcel of the said fifty pounds, the defendant had promised to pay it, but they likewise found, that as to the residue he had not promised to pay it. The verdict was holden to be for the defendant; because the promise found is different from that which is in issue.

Cro. Eliz. 292, Bagnal v. Sacheverel.

But, however it may have been heretofore holden, it is at this day certain, that the plaintiff in an action of *assumpsit* may recover a less sum than he has declared for, notwithstanding he have declared upon an *indebitatus assumpsit*.

And it was in a very late case holden, that, although the plaintiff in an action of *assumpsit* have declared upon an *insimul computassent*, he may recover damages to a less amount than the balance alleged to be due: And by Yates, J.—As the promise upon which an action of *assumpsit* is founded cannot extend further than to what is justly due, the jury, in assessing damages, have a power to divide the damages alleged in such manner that the plaintiff may recover what is justly due.

MS. Rep. Thompson v. Spencer, East. 8 G. 3, in K. B.; ‖2 W. Saund. 122; and so in debt the plaintiff may now recover less than he demands in the declaration. M'Quillin v. Cox, 1 H. Black. 249.‖

β After a verdict in an action of *assumpsit*, the promise alleged in the declaration will be considered an express or even a written promise.

Huntingdon v. Todd, 3 Day's Cas. 479; Insurance Company of Alexandria v. Young, 1 Cranch, 341; Beeker v. Beeker, 7 Johns. 99.ℊ

(O) Of a Verdict which varies from the Issue.

2. *In an Action upon the Case.*

In an action upon the case, the plaintiff declared, that the defendant, of whom he had bought two oxen, warranted them to be sound, and he alleged that they were unsound. The defendant pleaded not guilty, and issue was joined upon the plea. The jury found the defendant guilty as to one of the oxen, and not guilty as to the other. Upon a motion in arrest of judgment, it was insisted, that, as the issue is, whether the two oxen warranted to be sound were unsound, and the verdict finds that only one of them was unsound, the plaintiff ought not to have judgment. Judgment was given for the plaintiff: and by the court,—As the action is not in this case founded upon the contract,(*a*) but upon the deceit, the verdict is good.

Cro. Eliz. 884, Gravenor v. Mete. ‖(*a*) But in contract the defendant would have committed a breach if either of them were unsound.‖

In an action upon the case for a false return to a *mandamus*, the plaintiff declared that he was chosen bailiff of the borough of A upon the first day of October in a certain year, which was alleged to be the customary day for choosing a bailiff. The defendant pleaded not guilty, and issue was joined upon the plea. It was proved at the trial, that the plaintiff was chosen bailiff upon the twenty-ninth day of September in the year mentioned, and that this was the customary day for choosing a bailiff. It was objected, that as the day, which is in this case parcel of the custom, is material, the election proved is a different one from that which is in issue, and that for this reason the plaintiff ought not to recover. The objection was overruled, and by Holt, C. J.—As the substantial part of the issue, namely, whether the plaintiff was elected according to the custom, is proved, it is not material whether the election was upon the day mentioned in the declaration, or not.

Carth, 228, Vaughan v. Lewis.

In an action upon the case, in which the declaration charged the enclosing of three acres of land, the plaintiff alleged a right of common therein as appurtenant to sixty acres of land, sixty acres of meadow, and eighty acres of pasture. The defendant pleaded not guilty, and issue was joined upon the plea. It being found by the jury, that the plaintiff had a right of common in the three acres of land, as appurtenant to a messuage, and ninety acres of land, meadow, and pasture thereunto appertaining; and for the residue, that he had not common; judgment was given for the plaintiff. A writ of error being brought, it was assigned for error, that the right of common found by the verdict is different from that which is in issue. The judgment was affirmed: And by the court,—The right of common alleged is only matter of inducement; the substantial part of the issue being whether a wrong has been done to the plaintiff by enclosing. If the issue had been, whether the plaintiff's right of common were appurtenant to so much land, meadow, and pasture, as is mentioned in the declaration, the verdict would peradventure have been bad;(*a*) but it is not material upon the present issue, whether the plaintiff's right of common be found precisely as it is alleged or not.

Cro. Ja. 630, Eardley v. Turnock. ‖(*a*) *Sed* vide Ricketts v. Salwey, 2 Barn. & A. 360.‖

An action upon the case in the nature of a conspiracy being brought against two, they both pleaded not guilty, and issue was joined upon the plea. The jury found only one of the defendants guilty. The verdict was

holden to be good: and by the court,—In an action upon the case, in the nature of a conspiracy, one person may be found guilty.

2 Roll. Abr. 708, pl. 52.

But if, in an action of conspiracy against two, issue be joined upon the plea of not guilty, and the jury find only one of them guilty, the verdict is bad, because one person cannot be guilty of a conspiracy.(*a*)

2 Roll. Abr. 708, pl. 52. (*a*) ‖ As a conspiracy cannot be committed by one person alone, if all the defendants prosecuted are acquitted but one, and the conspiracy be not charged to be with persons unknown, it is clear the acquittal of the rest is the acquittal of that one also. 1 Hawk. P. C. c. 72, § 8; 3 Chit. C. Law, 1141. But if two persons be indicted for conspiracy, and only one of them appear and take his trial, he may be found guilty though the other defendant be absent and has not pleaded. Rex v. Kinnersley and Moore, 1 Stra. 193; and this although the other conspirator named in the indictment was dead before the indictment was preferred. Rex v. Nicholls and Bygrove, 2 Stra. 1227; 13 East, 412, *notis*.‖

3. *In an Action of Covenant.*

The plaintiff in an action of covenant declared, that upon the sale of certain land by the defendant to him, which was estimated at a certain number of acres, the defendant covenanted to pay him at the rate of eleven pounds by the acre, for as many acres as should be wanting of the number the land was estimated at; and he alleged, that as many acres were wanting, as did, at the rate of eleven pounds by the acre, amount to the sum of seven hundred pounds. The defendant pleaded, that there were not so many acres wanting, as did, at the rate of eleven pounds by the acre, amount to seven hundred pounds, and issue was joined upon the plea. The jury found a general verdict for the plaintiff; but they assessed damages to the amount of only four hundred pounds. The verdict was objected to as being variant from the issue; but it was holden to be good: and by the court,—As the design of the present action was to recover damages, it was entirely in the breast of the jury, notwithstanding they found all the acres to be wanting, to assess such damages as appeared to them to be reasonable.

2 Roll. Abr. 703, Hicks v. Goats. ‖ The plea here ought to have traversed that there were *any* acres wanting, since the defendant is not at liberty to plead so as to tie the plaintiff up to prove the *whole* of the damages stated; and if there was one acre wanting, the plaintiff was entitled to recover *pro tanto*, notwithstanding his assignment of a breach went further. See 2 W. Saund. 207, n. 24; Cobb v. Bryan, 3 Bos. & Pul. 348, and 1 W. Saund. 312 d; and tit. *Pleas and Pleadings*, (H), Vol. vii. p. 572.‖

4. *In an Action of Debt.*

In an action of debt upon the 2 and 3 E. 6, for not setting out tithes, the defendant pleaded *nil debet;* the jury found the value of the tithes subtracted to be less than the value alleged in the plaintiff's declaration. This was holden to be a verdict for the plaintiff: and by the court,—There is a difference betwixt an action of debt founded upon a specialty, or upon a contract, and one founded upon a statute, giving an uncertain sum by way of severalty. In the former case, the verdict cannot be for a less sum than is demanded, unless it be found that part of the debt was satisfied: but in the latter case, the verdict is good, although a less sum than is demanded is found to be due.

Cro. Ja. 449, Pemberton v. Skelton. ‖ But in debt the plaintiff may now, in any case, recover less than he demands. 1 H. Black. 249.‖

The plaintiff in an action of debt declared for the sum of twenty-four

pounds eight shillings. The defendant pleaded *nil debet*, and issue was joined upon the plea. The jury found that the defendant was indebted to the plaintiff in the sum of twenty-four pounds; but they likewise found that he was not indebted to him in the further sum of eight shillings. It was holden that the plaintiff should have judgment: and by the court,—The eight shillings may have been paid.

2 Roll. Abr. 702, Baugh v. Philips.

The plaintiff in an action of debt declared for the sum of twenty pounds. The defendant pleaded *nil debet*, and issue was joined upon the plea. The jury found that the defendant was indebted to the plaintiff in the sum of forty pounds. This was holden to be a verdict for the defendant.(*a*)

2 Roll. Abr. 702, pl. 3. (*a*) ‖ It would now clearly be held a verdict for the plaintiff.‖

In an action of debt brought against an executor, the plaintiff declared for the sum of twenty pounds, the defendant pleaded that he had no assets in his hands, and issue was joined upon the plea. The jury found that the defendant had assets in his hands to the amount of forty pounds. This was holden to be a verdict for the plaintiff; for, notwithstanding it vary from the issue, the substantial part of the issue, namely, whether the defendant had assets in his hands sufficient to satisfy the plaintiff's debt, is found for the plaintiff.

2 Roll. Abr. 702, pl. 4.

In an action of debt the plaintiff declared upon a bond dated the 25th day of November. The defendant pleaded *non est factum*, and issue was joined upon the plea. The jury found a bond dated the 15th day of November. This was holden to be a verdict for the plaintiff, because the substantial part of the issue, namely, whether the bond be the deed of the defendant, is found for the plaintiff.

Cro. Ja. 136, Lane v. Pledall, Mich. 4 J. 1. ‖ This would clearly now be held a fatal variance.‖

But it is said in a subsequent case, that the verdict would in such case be for the defendant, because the bond found is not the bond that is in issue; and the case of Lane v. Pledall, is expressly denied to be law. It is, however, in this case laid down, that if the jury in such case find a bond dated the same day as the bond upon which the action is brought is alleged to be dated, the verdict is for the plaintiff; notwithstanding they likewise find that the bond was delivered upon a day different from that on which it is dated.(*b*)

Salk. 463, Cromwell v. Grunsden, Pasch. 10 W. 3. (*b*) ‖ Because the description "dated," or "bearing date," in the declaration, is satisfied, by showing a bond bearing date on the day alleged, though the delivery may be subsequent; but the bond has no operation till the delivery. Co. Lit. 46 b; 4 East, 477; Cowp. 714; Steele v. Mart, 4 Barn. & C. 272; Styles v. Wardle, 4 Barn. & C. 908.‖

The plaintiff in an action of debt declared upon a bond entered into by the defendant. The defendant pleaded *non est factum*, and issue was joined upon the plea. The jury found a bond entered into by the defendant and J S. This was holden to be a verdict for the plaintiff; for that, as the defendant and J S did both seal and deliver the bond, it is the deed of each of them; and consequently each of them is answerable for the whole money thereupon due.(*c*)

5 Rep. 119, Whelpdale's case. ‖ (*c*) Unless he plead in abatement that the other ought to be joined. 1 W. Saund. 291 d; 5 Burr. 2611; 1 Barn. & A. 29, 224.‖

(O) Of a Verdict which varies from the Issue.

In an action of debt upon a bond, conditioned for the performance of the covenants in an indenture, one of which was that the defendant should not cut down trees, the breach assigned was cutting down twenty trees. The defendant pleaded that he did not cut down twenty trees, and issue was joined upon the plea. The jury found that the defendant did not cut down twenty trees; but they found that he cut down ten. This was holden to be a verdict for the plaintiff: and by the court,—Although the verdict vary from the issue, yet, as enough is found to make the defendant liable to the penalty of the bond, the plaintiff ought to have judgment.

Dyer, 115, Anon.; 1 Inst. 282; Hob. 53. ‖ The plea should have negatived cutting any trees; but in such case the finding of the jury cures the informality of the issue. 2 W. Saund. 207, n. 24, and 319; 3 Bos. & Pul. 348; and tit. *Pleas and Pleadings*, (H), Vol. vii. p. 572.‖

The defendant in an action of debt pleaded payment of the money, for which the action was brought, at A. Issue being joined upon the plea, the jury found that the money was paid at B. This was holden to be a verdict for the defendant; for that, as the payment of the money is the substantial part of the issue, it is not material where it was paid.

1 Keb. 662, Lucas v. Harlow; ‖2 W. Saund. 319.‖

{In an action on st. 37 G. 3, c. 90, s. 26, for penalties against two proctors for not obtaining and entering their certificates, one may be found guilty, and the other acquitted; for the action is founded on a tort.

2 East, 569, Barnard v. Gostling; Ibid. 573, n., Hardyman v. Whitaker, S. P.; Carth. 361, Bastard v. Hancock, S. P.}

βIn an action of debt in the *detinet*, on the issue of *non solvit* the jury found a certain sum due from the defendant to the plaintiff, without any determination of the issue. Held, that the finding was good.

Thompson v. Musser, 1 Dall. 458.

In debt on bond, issues were joined on the plea of *non est factum*, *solvit ad diem*, and *solvit post diem*; the verdict was, that "the defendant is not indebted to the plaintiff." Held, that the verdict was essentially defective, as it did not appear that the jury had agreed on any one issue.

Coffin v. Jones, 11 Pick. 42.

In an action of debt on bond, with a condition to secure the payment of money only, the defendant pleaded payment and gave notice of set-off; if any part of the debt has been paid, it is proper for the jury to specify by their verdict the exact balance due to the plaintiff, though the judgment must be entered for the penalty.

Richman v. Richman, 5 Halst. 114.g

5. *In an Action of Ejectment.*

The plaintiff in an action of ejectment declared upon a lease from two persons. Issue being joined upon the plea of not guilty, the jury found that the lessors of the plaintiff were tenants in common. This was holden to be a verdict for the defendant: and by the court,—As only one lease is declared upon, and the verdict virtually finds two, the estates of tenants in common being several, the variance is in a matter of substance. But it is said, that if the jury had found that the lessors of the plaintiff were coparceners, the verdict would have been for the plaintiff, because, as two coparceners make only one heir, their joint lease is as good as the joint lease of two joint-tenants would have been.(*a*)

2 Roll. Abr. 719, pl. 25. ‖ (*a*) See 1 Esp. Ca. 330; Adams on Ej. 184; 1 Wils. 1; 2 Wils. 232; and *antè*, tit. *Ejectment*, Vol. iii.‖

(O) Of a Verdict which varies from the Issue.

If the plaintiff in an action of ejectment declare upon a lease for a term of years made at a day certain, the term demised by which is to commence immediately, and the jury find a lease for the same term made at another day, the verdict is for the defendant, the variance being in a matter of substance.(*a*)

2 Roll. Abr. 704, pl. 20. ‖(*a*) The cases referred to under this head are almost all now inapplicable, as by the modern practice the lease, entry, and ouster are confessed; it is only necessary that the term should be of sufficient length to admit of the lessor's recovering possession before it expires; and that the day of the demise should be after the lessor's title accrues.‖

But if the plaintiff in an action of ejectment declare upon a lease for a term of years made the first day of May, in a certain year, the term demised by which is to commence at the Michaelmas day following, and the jury find a lease for the same term made the first day of June in the same year, the term demised by which is to commence at the Michaelmas day following, the verdict is for the plaintiff; for it is not material upon what day the lease was in such case made, provided it was made before the day on which the term was to commence.

2 Roll. Abr. 704, pl. 119.

If the plaintiff in an action of ejectment declare upon a lease of twenty acres, and the defendant who has pleaded not guilty, be found guilty as to ten acres, the verdict is good; but it is in this case said, that if the defendant had pleadad *non dimisit*, and the defendant had been found guilty as to ten acres, the verdict would have been bad.

Dalis. 105.

And it is in a subsequent case laid down, that the plaintiff would in such case be entitled to judgment as to ten acres, notwithstanding the defendant had pleaded *non dimisit*.

2 Roll. Abr. 703, Brown v. Meredith, Pasch. 43 Eliz.

But in a still later case it is laid down, that the plaintiff would not in such case be entitled to judgment; for that, as the lease found is not that on which issue is joined, the variance is in a matter of substance.

2 Roll. Abr. 720, Brown v. Ellis, Pasch. 3 Jac. 1.

If the plaintiff in an action of ejectment declare upon a lease of a house, and the jury find that only part of the house is built upon the land of the plaintiff, he shall have judgment for that part.

Roll. Abr. 704, pl. 22; Jenk. 268, pl. 83.

The plaintiff in an action of ejectment declared upon a lease of a hundred acres of land. The jury found the defendant guilty as to forty acres, and as to the residue not guilty. The verdict was holden to be good.

Cro. Eliz. 13, Guy v. Rand.

The plaintiff in an action of ejectment declared upon a lease of a fourth part of a fifth part of a field. The jury found the defendant guilty as to a third part of a fourth part of a fifth part. The verdict was holden to be good: and by the court,—The jury may always find the defendant in an action of ejectment guilty as to so much as the plaintiff proves a title unto: but the reporter subjoins a query, In what manner the writ of possession is in such case to be executed?

1 Sid. 229, Ablett v. Skinner.

The plaintiff in an action of ejectment declared upon a lease of a moiety

of certain premises. The jury found the defendant guilty as to a third part of the premises. In order to arrest the judgment, it was said that the verdict is bad, because it does not find the defendant guilty as to all that the plaintiff has declared for. The rule for arresting the judgment was discharged: and by Lord Mansfield, C. J.,—There seems to be no good reason why the plaintiff in an action of ejectment should not recover that part of what he has declared for, to which he proves a title: and it is laid down in 1 Sid. 229, that he may recover such part.

MS. Rep. Burgess v. Burgess, East. 30 G. 2, in B. R.; [1 Burr. 326, S. C.;] ‖1 Espin. Ca. 330.‖

If an action of ejectment be brought against a husband and his wife, and only one of them be found guilty, the verdict is good.

Latch, 61, Hems v. Stroud.

6. *In an Action of Replevin.*

The defendant in an action of replevin alleged, that the plaintiff held land of him by fealty, suit of court, and the yearly rent of three shillings and four pence; and he avowed the taking for rent in arrear. The plaintiff traversed the holding alleged by the defendant, and issue was joined upon the traverse. The jury found that the plaintiff held of the defendant by fealty, and the yearly rent of three shillings and four pence; but that he did not hold by suit of court. This was holden to be a verdict for the plaintiff, because the whole of the title to distrain alleged by the avowant, every part of which is material in an action of replevin, is not found.

Cro. Eliz. 790; Lewes v. Bucknall, Yelv. 148.

In an action of replevin, the defendant, a commoner, avowed the taking of cattle damage-feasant upon the eleventh day of April in a certain year. The plaintiff pleaded, that Williams, another commoner, had, upon the thirtieth day of March in the same year, demised his right of common to the plaintiff, to be holden by him from the twenty-fifth day of the said March, for one year. The defendant traversed the demise, and issue was joined upon the traverse. The jury found a demise from Williams to the plaintiff, made the twenty-fifth day of March in the same year, by which Williams had demised his right of common to the plaintiff for one year from thence next ensuing. In order to arrest the judgment, it was insisted, that the demise found is different from that which is in issue: but judgment was given for the plaintiff. And by the court,—The substantial part of the issue, namely, whether the plaintiff had at the time of taking his cattle a right of common under a demise from Williams, is found for him; and the day of making the demise is not material. The report adds, that, if the jury had found any other right of common in the plaintiff than under a demise from Williams, the verdict would have been bad.

Hob. 72, Pope v. Skinner. ‖The reporter observes, that the jury might have found a general verdict against the plaintiff on *non dimisit, &c.*, and could not safely have found for him generally; and see Forty v. Imber, 6 East, R. 434; 1 Saund. 285 b; 2 Saund. 312, 319.‖

The defendant in an action of replevin avowed the taking of cattle damage-feasant. In bar of this avowry the plaintiff prescribed for a right of common. Issue being joined upon the prescription, the jury found, that the plaintiff had a right of common; but they likewise found, that he ought to pay yearly for the same a hen and five eggs. This was holden to be a

verdict for the plaintiff; for that, as the payment is not parcel of the prescription, but a collateral recompense, for which the person to whom it is due has a remedy, it was not necessary for the plaintiff to set out, that he was liable to the payment, his title to the right of common being complete without setting this out: but it is added, that if the jury had found, that the plaintiff had a right of common upon paying a hen and five eggs, the verdict would have been for the defendant; because, as the payment would then have been parcel of the prescription, the plaintiff would not, in case he had omitted to set this out, have shown a complete title to the right of common.

5 Rep. 78, Gray's case. ‖As to pleading prescriptions, see 1 W. Saund. 268.‖

‖Where to an avowry for 120*l.* rent in arrear, the plaintiff pleaded that the said 120*l.* is not due, and the defendant took issue on the plea, and at the trial it appeared that only 24*l.* rent was due, and the plaintiff argued that the evidence did not support the issue, and a verdict was taken for the 24*l.*, subject to the opinion of the court, it was held that this finding cured the informality of the issue, which ought to have contained the words "or any part thereof."

Cobb v. Bryan, 3 Bos. & Pul. 348; and see 2 W. Saund. 319.

Where an avowry stated that the defendant held the premises at a certain yearly rent, to wit, the yearly rent of 72*l.*, and the plaintiff pleaded, 1st, *non tenuit*, 2d, *riens in arrear*, and the first plea was found for the plaintiff; it was held that the second plea became thereby immaterial, and that the proper course was to discharge the jury from finding any verdict upon it, but that if any verdict was entered upon it, it must be entered for the plaintiff.

Cossey v. Diggons, 2 Barn. & A. 546.‖

β A verdict in replevin that the property is not in the defendant, or not in those in whom, by the inducement in the plea, it has been stated to be, is insufficient.

Chambers v. Hunt, 3 Harr. (N. J.) 339.g

7. *In an Action of Trespass.*

In an action of trespass the plaintiff declared, for the threshing and carrying away of twenty bushels of barley. The defendant having pleaded not guilty, the jury found him guilty of carrying away the barley, but not of threshing it. This was holden to be a verdict for the plaintiff. And by the court,—Torts are several, and the carrying away of the barley was a tort, for which the plaintiff is entitled to recover damages.

2 Roll. Abr. 703, pl. 15.

In an action of trespass the plaintiff declared for breaking and entering his close. The defendant having pleaded not guilty, the jury found, that the trespass was committed in the close, and that one acre of the close was in possession of the plaintiff: but they likewise found, that a larger part of the close was in the possession of the defendant, and that a still larger part thereof was in the possession of J S. This was holden to be a verdict for the plaintiff. And by the court,—As it is found, that the trespass was committed in the close, and that part of the close was in the possession of the plaintiff, he is entitled to recover damages.

Cro. Eliz. 170; Dod v. Coke; 2 Roll. Abr. 703, pl. 10. ‖See Richards v. Peake, 2 Barn. & C. 918.‖

(O) Of a Verdict which varies from the Issue.

In an action of trespass, the plaintiff declared for breaking his close, and for eating his grass with divers cattle, to wit,(*a*) with horses, oxen, and cows. The defendant having pleaded not guilty, the jury found him guilty of breaking the close and eating the grass with divers beasts; and judgment was given for the plaintiff. A writ of error being brought, it was assigned for error, that it is not found, that the grass was eaten by the beasts of any of the kinds mentioned in the declaration. The judgment was affirmed. And by the court,—The substantial part of the issue, namely, whether the grass of the plaintiff was eaten by divers cattle of the defendant, is found; and it is not material of what kind the beasts were.

Cro. Ja. 662, Elston v. Durrant. ‖(*a*) As to the effect of a *videlicet* in preventing an immaterial averment from becoming material, see 1 W. Saund. 170, n.; 2 W. Saund. 291 b; and tit. *Pleas and Pleadings*, (B), Vol. vii. p. 503.‖

In an action of trespass against J S and J N, the plaintiff declared for taking his gun. The defendant J S pleaded, that the plaintiff made an assault upon A B with the gun, and that thereupon he, in order to keep the peace and preserve the life of A B, took the gun. The defendant J N pleaded not guilty. Issues being joined upon both pleas, the jury found the issue upon the first plea for J S, but they found J N guilty. In order to arrest the judgment against J N, it was insisted, that, as the first issue is found for J S, there ought not to be judgment against J N. Judgment was given against him. And by the court,—As J N is found guilty, the court, rather than suffer him to avail himself of the plea of justification found for J S, will intend that the taking of the gun by J N was at another time. But it is said, that if J S had pleaded a gift of the gun by the plaintiff, and J N had pleaded not guilty, and the issue upon the plea of J S had been found for him, there could not have been judgment against J N, notwithstanding the issue upon the plea of not guilty has been found against him; because it would then have appeared to the court, from the finding of the issue upon the plea of J S, that the plaintiff had no cause of action.

Cro. Ja. 134, Marler v. Ailiff and another. ‖See 2 Mod. 68.‖

β On a collateral issue, whether the injury complained of were the same with the one which was the foundation of an action against a joint trespasser, in which there had been a satisfaction, the jury found that the case was precisely the same; but three of the jurors added, that they "did not think the defendant should be cleared of the guilt." Held, that the issue was substantially found.

Duane v. Simmons, 4 Yeates, 441.g

8. *In divers other Actions.*

In an action of account, the defendant pleaded, that he had accounted before J S and J N, auditors assigned by the plaintiff. Issue being joined upon the plea, the jury found that the defendant had accounted before J S only. This was holden to be a verdict for the defendant. And by the court,—The substantial part of the issue, namely, whether he had accounted to an auditor assigned by the plaintiff, is found for him.

Bro. *Verd.* pl. 99.

In an assize of darrein presentment the demandant alleged, that the avoidance of the church was by deprivation of the last incumbent. Issue being joined upon the allegation, the jury found, that the avoidance of the

(O) Of a Verdict which varies from the Issue.

church was by the death of the last incumbent. This was holden to be a verdict for the demandant. And by the court,—The avoidance of the church is the substantial part of the issue, the manner of avoiding being only a circumstance.

1 Inst. 282.

In a writ of second deliverance, the plaintiff made title under a deed of feoffment to A and B to his use. The defendant traversed, that the deed of feoffment was to the use of the plaintiff, and issue was joined upon the traverse. The jury found a deed of feoffment to A, B, and C, to the use of the plaintiff. This was holden to be a verdict for the plaintiff. And by the court,—The substantial part of the issue is, whether a deed of feoffment was made to the use of the plaintiff; which being found, it is not material whether the number of the feoffees was two or three.

Noy, 93, Dicker v. Mollard.

In a suit upon a writ of prohibition, the plaintiff alleged a *modus*. The defendant pleaded, that there is not such a *modus* as the plaintiff has alleged. Issue being joined upon the plea, the jury found a *modus* different from that alleged by the plaintiff, and a consultation was prayed. It was holden, that a consultation ought not to be awarded. And by the court,—As the jury have found, that there is a *modus*, the defendant ought not to be suffered to sue in the spiritual court for tithes in kind.

1 Ventr. 32, Anon.; [1 Term R. 427, Brock v. Richardson, S. P.;] ‖Gwill. Tith. Ca. 1303; Eag. & Young, 353; and *antè*, tit. *Tythes*.‖

9. *In a criminal Prosecution.*

In an indictment for murder, the jury, provided they are satisfied the killing was not of malice aforethought, may find the prisoner guilty of manslaughter; for the killing is the substantial part of the issue.

It is said to be usual to prefer two indictments against a person guilty of homicide by stabbing, one upon the statute against stabbing, and another for murder, that, in case the evidence be not sufficient to convict the prisoner of murder upon the former indictment, he may be convicted of manslaughter upon the latter.

Fost. 299.

But it is in other books laid down, that the person indicted upon the statute against stabbing may, upon this indictment, be found guilty of manslaughter; for that the killing is the substantial part of the issue.

H. P. C. 58; 1 Jo. 433; Kel. 132.

It was charged in an indictment for murder, that Mackally, the prisoner, did feloniously wound Richard Fell, and that he died of the wound. The jury found, that Mackally did give a wound to Richard Fell, together with the circumstances which attended the giving of it, and that he died of the wound; and they concluded their verdict in these words: "If upon the whole matter the court shall be of opinion that the killing was murder, then we find Mackally guilty of murder in the manner it is charged in the indictment." An exception was taken, that, as the jury had not found that Mackally did feloniously wound Richard Fell, the court could not adjudge that the wounding was felonious. The exception was not allowed. And by the court,—The jury may in any case find the fact with its circumstances, and submit the law arising thereupon to the consideration of the court. In the present case the jury have moreover virtually found, that the wound-

(P) Of the Words *Modo et Forma* in a Verdict.

ing was felonious; for they say, that, *if upon the whole matter the court shall be of opinion that the killing was murder, then we find Mackally guilty of murder in the manner it is charged in the indictment.* The consequence is, that as the court have adjudged the killing to be murder, the jury have found Mackally guilty of murder in the manner it is charged in the indictment; and it is therein charged that the wounding was felonious.

9 Rep. 63, 69, Mackally's case.

In an information against J S and J N, the engrossing of a thousand quarters of corn was charged. The defendants having both pleaded not guilty, the jury found that J S had engrossed seven hundred quarters of corn. The other defendant J N was found not guilty. It was holden, that judgment should be given against J S, because the information is for a tort, and torts are several.

2 Roll. Abr. 707, pl. 48.

(P) Of a Verdict where the Words *Modo et Forma* are contained in the Traverse upon which Issue is joined.

If issue be joined upon a traverse in which the words *modo et forma* are contained, some circumstances, that would not otherwise be so, are by these words made material, and must be found by the verdict.

2 Roll. Abr. 708, pl. 58. ‖ See Vin. Abr. tit. *Modo et Forma.*‖

If a feoffment by deed be traversed, and the words *modo et forma* be contained in the traverse, and the jury find a feoffment without deed, the verdict is bad; the words *modo et forma* being in this case essential to the issue.

1 Inst. 281.

In an action of debt the plaintiff declared, that the defendant was indebted to him in the sum of forty shillings for a horse sold. The defendant pleaded *nil debet modo et forma*, and issue was joined upon the plea. The jury found, that the defendant was indebted to the plaintiff in the sum of forty shillings for two horses sold. The verdict was holden to be bad; because the contract found is different from that upon which issue is joined.

2 Roll. Abr. 702, pl. 2. ‖ But the count now would only express horses, &c., goods, wares and merchandises, sold, &c., and the only reason why the plaintiff is bound to show wherein the defendant is indebted is, that it may appear that it is not on a record or specialty, but on a simple contract. 2 Will. Saund. 350.‖

In an action of replevin the defendant avowed the taking as a distress for rent in arrear, and made title in himself to distrain, by virtue of an absolute devise from J S to him of the place in which the distress was taken. The plaintiff pleaded, that J S did not devise to the defendant *modo et forma* as he has alleged, and issue was joined upon the plea. The jury found a devise from J S to the defendant upon a condition precedent; and they also found, that the condition was performed at the time the devise was pleaded. The verdict was holden to be for the plaintiff. And by the court,—As the devise to the defendant is conditional, and not absolute, it is not such a devise as he has alleged.

2 Roll. Abr. 709, pl. 61.

A devise by J S, of certain premises to J N, in fee having been pleaded, the plaintiff replied, that J S did not devise *modo et forma* as the defendant has alleged. Issue being joined upon the replication, the jury found that

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J S devised the premises to A, for a term of years, with remainder to J N, in fee, and that the term was subsisting. It was holden, that, as the devise found is substantially different from that on which the issue is joined, the one being a devise of an estate in possession, the other a devise of an estate in remainder, it is not such a devise as the defendant has alleged.

1 Jon. 224, Rex v. Nudigate.

Upon considering the cases already cited, it will appear, that the circumstances traversed by traversers in which the words *modo et forma* were contained were holden to be material, because they were essential to the issues: from whence it may be fairly inferred, that the verdict was not in any one of the cases holden to be bad, merely because the words *modo et forma* were contained in the traverse upon which it was joined, but because the jury had not found a circumstance, which was essential to the issue.

It will appear from some other cases which shall be mentioned, that, although the words *modo et forma* are contained in the traverse upon which issue is joined, the materiality of what is traversed very seldom depends upon these words.

It is in one book laid down generally, that although the words *modo et forma* are contained in the traverse upon which issue is joined, it is not necessary that the verdict should find every circumstance which is traversed; for that, if all the material circumstances of the issue are found, it is not necessary that any immaterial circumstance should be found.

1 Inst. 281. ‖ And these words, though usual, are not essential in a traverse; and the omission of them is not cause of demurrer. Com. Dig. *Pleader*, (G) 1.‖

If a man bring a writ of entry in *casu proviso* upon the alienation of tenant in dower to his disherison, and allege an alienation in fee; and the tenant plead, that she did not alienate *modo et forma*, and issue be joined upon the plea, and it be found by the jury that the tenant did alienate in tail or for life, the demandant shall recover, notwithstanding the alienation was not such an alienation as is alleged; because, as the substantial part of the issue, namely, whether the tenant did alienate to the disherison of the demandant, is found, the manner of alienating is not material.

1 Inst. 281.

In an action of trespass, the plaintiff declared for the taking of his goods upon a day certain, and at a place certain. The defendant pleaded not guilty, *modo et forma* as the plaintiff has alleged, and issue was joined upon the plea. The jury found the defendant guilty upon another day, and at another place. The verdict was holden to be good; because the substantial part of the issue, namely, whether the goods were taken, is found, and neither the day when, nor the place where, they were taken is material.

1 Inst. 282. ‖ See 1 Chitty on Plead. 257; Stephen on Plead. 312.‖

‖ Where the plaintiff declared for an assault and battery, and tearing his clothes, and the defendant pleaded that he was not guilty of the said supposed assaults in *manner and form* as the plaintiff had complained; it was held that by the *modo et forma* the battery and *laceravit* were denied as well as the assault.

Weathrell v. Howard, 3 Bing. 135.‖

In an action of trespass *quare clausum fregit*, the defendant justified under a right of common in the *locus in quo*, from the day of Pentecost in every year to a day certain in the same year. The plaintiff traversed that the

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defendant had a right of common *modo et forma* as he had alleged, and issue was joined upon the traverse. The jury found, that the defendant had a right of common upon the day of Pentecost in every year, and from the day next thereunto, until the day certain in the same year mentioned in his plea. This was holden to be a verdict for the defendant; because the substantial part of the issue, namely, whether he had a right of common at the time the trespass is charged, is found; and it is not necessary that the title of the defendant to the right of common should in such case be found precisely as it is set out. But it was in this case agreed, that if a man bring an assize of right of common, it is necessary to set out a title thereto, and that this must be found precisely as it is set out; for that the demandant is not in such case entitled to recover, unless it be found by the jury that he has the very title to the right of common which is set out.

Moor, 864, Thorowgood v. Johnson; 2 Roll. Abr. 708, pl. 55, S. C.

In an action of trespass, the plaintiff declared for breaking his house and taking his goods. The defendant pleaded, that the house is holden of him, as of his manor of A, by homage, fealty, escuage, suit of court, and the yearly rent of one pound of cummin seed, and that he entered the house and distrained the goods for three years' rent in arrear. The plaintiff replied, that the house is holden of J S as of his manor of B, *absque hoc* that it is holden of the defendant *modo et forma* as he has alleged. Issue being joined upon the replication, the jury found, that the house is holden of the defendant, as of his manor of A, by homage, fealty, and the yearly rent of one pound of cummin seed, and not otherwise. This was holden to be a verdict for the defendant: and by the court,—Notwithstanding the verdict does not find the holding to be precisely as the defendant has alleged, it finds the substantial part of the issue, that the house is holden of the defendant; which, although it would not have been sufficient finding in an action of replevin, is so in the present action, wherein the defendant is charged as a wrong-doer.

Yelv. 148, Goodman v. Ayling.

The declaration in an action upon the case charged the speaking of the following words,—*There is a great nest of thieves at Pirton, and Sir John Brugis is the maintainer of them, and he is a strong thief himself.* The defendant traversed the speaking of the words *modo et forma* as the plaintiff has alleged. Issue being joined upon the traverse, the jury found that the defendant spoke all the words charged, except the word *strong*, and assessed damages for the plaintiff. Upon a motion in arrest of judgment, it was insisted, that, as all the words charged are not found to have been spoken by the defendant, the plaintiff ought not to have judgment: but judgment was after deliberation given for the plaintiff.

Dyer, 75, Brugis v. Warneford. ‖ See 1 Will. Saund. 242 a.‖

In an action upon the case, the plaintiff charged the speaking of the following words,—*If Sir John Sidenham might have his way he would kill the king.* The defendant traversed the speaking of the words *modo et forma* as the plaintiff has alleged. Issue being joined upon the traverse, the jury found, that the defendant spoke the following words,—*I think in my conscience if Sir John Sidenham might have his way he would kill the king.* Haughton, J., was of opinion, that as the jury have found other words as well as those charged, the verdict is for the defendant: but Montagu, C. J., Croke, J., and Dodderidge, J., were of opinion, that as

(Q) Of a Verdict not finding the Matter in Issue with Certainty.

the words charged are all found, and the other words found do not alter the sense or take off the force of the words charged, the verdict is for the plaintiff; and judgment was given for him. A writ of error being brought in the Exchequer-chamber, Hobart, C. J., of the Common Pleas, Wynch, and Denham, were of opinion that, as the manner and form of speaking the words is traversed, and they are not found to have been spoken precisely as they are charged, the verdict is for the defendant: but Tanfield, C. B., Warburton, Bromley, and Hutton being of a different opinion, the judgment of the Court of King's Bench was affirmed.

Cro. Ja. 407, Sidenham v. Man.

(Q) Of a Verdict which does not find the Matter in Issue with Certainty.

In an action of ejectment for a messuage, the jury found the defendant guilty as to so much of the messuage as stands upon a certain bank. The verdict was holden to be bad, because it is uncertain: and by the court, —Although a verdict which finds the defendant guilty as to part of what is demanded in ejectment may be good, it can only be so where the defendant is found guilty as to a certain part; because, if the verdict do not find something in certainty, the court cannot give judgment; for the maxim is, *oportet quod res certa deducatur in judicium.*

Mar. 97, Juxon v. Andrews. {See 2 Day, 68, Kinney v. Williams.}

In an action of dower the tenant pleaded that the husband of the demandant was never seised of the premises of which she demanded dower. Issue being joined upon the plea, the jury found that the husband was seised of the premises, except so much thereof as belonged to J S. The verdict was holden to be bad; because, as it does not appear what part of the premises did belong to J S, the court cannot tell of how much to give judgment.

2 Roll. Abr. 694, (U), pl. 2.

In an assize the demand was of an arrear of a rent-charge of twenty pounds devised to the demandant. The jury found that the rent-charge was in arrear for the term of thirty years; but they did not find when the devisor died. The verdict was upon a writ of error holden to be bad; because, as the time of the devisor's death is not found, it does not appear at what time the thirty years ended, for which the rent-charge is found to be in arrear.

Cro. Car. 521, Morris v. Prince.

In an action of debt the plaintiff declared for divers sums of money, amounting in the whole to forty pounds. Issue being joined upon the plea of *nil debet*, the jury found that the defendant was indebted to the plaintiff in the sum of thirty pounds, but that the residue of the forty pounds was not due to the plaintiff. Judgment being given for the plaintiff, it was upon a writ of error holden, that, as the verdict does not find in which of the particular sums the defendant was indebted to the plaintiff, he ought not to have had judgment; because, as it is uncertain for which of the sums the judgment was given, the defendant can never know how to plead the judgment in bar, in case another action should be brought for any of the sums; and the judgment was reversed.

Cro. Ja. 653, Treswell v. Middleton. ‖ This was before it was established, that the plaintiff might recover a less sum than he demands. 1 H. Black. 249.‖

(Q) Of a Verdict not finding the Matter in Issue with Certainty.

It appears from the cases already cited, that the verdicts therein were holden to be bad, because they were uncertain as to something which was material to the gist of the action; and it may be inferred from the following cases, that if the thing, as to which a verdict is uncertain, be not essential to the issue, the verdict is, notwithstanding such uncertainty, good.

In an action of trespass *quare clausum fregit*, the declaration charged, that the trespass was committed in a certain acre of land, of which the abuttals were set forth. Issue being joined upon the plea of not guilty, the jury found the defendant guilty of a trespass in one half of the acre, and assessed damages for the plaintiff; but they did not find in which half the trespass was committed. The verdict was holden to be certain enough: and by the court,—As damages are to be recovered in this action, and not the land itself, the plaintiff may recover damages for a trespass in one half of the acre; and it is not material in which half it was committed.

Noy, 125, Winksworth v. May, Mar. 97.

In an action of debt upon the 1 Jac. 1, c. 22, for felling oaks at a time prohibited, not guilty was pleaded, and issue was joined upon the plea. The jury found that the defendant had felled ten oaks, and that the value of each was six shillings and eight pence. Upon a motion in arrest of judgment it was insisted, that the verdict is bad, because the jury have not added the sums together and found a precise sum. The verdict was holden to be good: and by the court,—If the defendant had pleaded *nil debet* the verdict would have been bad, for want of having found a precise sum to be due; but it is not necessary that a precise sum should be found to be due, where the plea in an action of debt is not guilty.

1 Keb. 835, Duke of Norfolk v. Johnson.

An indictment was found against a person for exercising a trade unlawfully for the space of three months; to wit, from a day certain to a day certain. Issue being joined upon the plea of not guilty, the defendant was found guilty as to one month, without saying which; and not guilty as to the two other months. Upon a motion in arrest of judgment, it was insisted, that as it does not appear for which of the three months the defendant is found guilty, he cannot plead a conviction upon this indictment in bar of a second for the same offence. The verdict was holden to be certain enough: and by the court,—If a second indictment should be found against the defendant, he may plead a conviction upon the first indictment for one month, and traverse his having been guilty any other month.

12 Mod. 561, Anon. ‖As to pleading *auterfois acquit*, and *convict*, when the records vary so that it is necessary to show the identity of the offences by averment, see 1 Stark. C. L. 325; and see tit. *Pleas and Pleadings*, (I) 13, Vol. vii.‖

β The jury must answer to the whole issue with which they have been charged.

Kerr v. Hawthorne, 4 Yeates, 295.

The verdict of the jury is not vitiated by their finding, in addition to what is in issue, matter merely superfluous.

Cavene v. McMichael, 8 S. & R. 441; Fisher v. Kean, 1 Watts, 259.

In an action for freight and demurrage, the verdict was in these words, "We find for the plaintiff, and are of opinion that the plaintiff has already received, out of the property of the defendant, payment in full for the amount of freight to which he is entitled." Set aside for uncertainty.

Diehl v. Evans, 1 S. & R. 367.

(R) Of a Verdict which does not find the Matter in Issue expressly.

In a real action, if the jury find by their verdict that as to "all the demanded premises above low water-mark, the defendant has a better right to recover than the tenant has to hold," such verdict is good, it being sufficiently certain to enable the sheriff to execute it by *habere facias*.

Adams v. Frothingham, 3 Mass. 352.

After the verdict has been received and recorded, and the jury has been dismissed, they cannot alter their verdict on an allegation of mistake.

Walter v. Junkins, 16 S. & R. 414.

But they may be sent back to correct an informality, if discovered before they are dismissed.

Walfran v. Eyster, 7 Watts, 38; 4 Watts, 357.

When the issue joined is material, the verdict ought to find the issue for or against the party tendering it.

Holmes v. Wood, 6 Mass. 1.

When a verdict finds two inconsistent material facts, it is void.

Stearns v. Barrett, 1 Mason, 153.

A *qui tam* action for three several penalties of thirty dollars each: a general verdict for one penalty, without designating the offence of which the defendant was guilty, is bad.

Whitlock v. Tompkins, 1 Penning. 273.

(R) Of a Verdict which does not find the Matter in Issue expressly.

THE matter in issue was, Whether J S had resigned a certain benefice to a certain bishop. The jury found an instrument under the seal of the bishop, upon which there was an endorsement, that J S had resigned the benefice to the bishop, and that he had accepted the resignation. The verdict was holden to be bad; because it does not find expressly that J S had resigned the benefice.

Noy, 147, Smith v. Foaves. ‖See 1 East, 111.‖

An estate having been granted by copy of court-roll to three persons for their lives, the matter in issue was, Whether a heriot was, by the custom of the manor, due upon the death of one of the three persons. The jury found, that the custom of the manor did not warrant the granting of an estate for three lives. The verdict was holden to be bad; because it only finds argumentatively that a heriot ought not to be paid; whereas it is the duty of the jury to find the matter in issue expressly.

2 Roll. Abr. 693, (S), pl. 1.

If the matter in issue be whether an estate may by the custom of a manor be granted by copy of court-roll for two lives, and the jury find, that an estate may by the custom of the manor be granted for three lives, the verdict is bad; because it is only argumentative to say, that, inasmuch as a greater estate may by the custom of the manor be granted, a less one may.

2 Roll. Abr. 693, (S), pl. 2.

In an action of *assumpsit* the plaintiff declared, that the defendant in consideration of four pence promised to give the plaintiff forty pounds. Issue being joined upon the plea of *non assumpsit*, the jury found a special verdict in these words, "If the law will that the jury shall give damages to the amount of forty pounds, then they assess damages to that amount;

(S) Of a Verdict which finds a Matter in a Foreign County.

but, if the law will that the jury may give damages as they please, then they assess damages to the amount of three pounds and no more." The verdict was holden to be bad; because the jury have not assessed any damages expressly.

2 Roll. Abr. 695, pl. 6.

If the matter in issue be, whether a thing is fraudulent, the court will never conclude that it is so, however strong the circumstances of fraud found by the jury are.

Cro. Car. 550, Crisp v. Pratt.

In an action of trover the court will never intend that the defendant is guilty of a conversion, unless it be expressly found that he is, however strongly the circumstances found by the jury may tend to show that he is guilty.

2 Mod. 244, 245, Mires v. Solebay; 10 Rep. 57. ‖See 2 Will. Saund. 47 e; Wilton v. Girdlestone, 5 Barn. & A. 847.‖

The court will never intend, from any evidence of circumstances found by the jury, that the defendant in an indictment is guilty of the offence therein charged, unless the jury expressly find him guilty.

12 Mod. 628, Rex v. Plummer.

βWhen a declaration in trespass contains two counts for the same trespass, and the defendant pleads the general issue as to both, and a special plea in bar as to one of them; and on trial a verdict is found for him on the special plea, he is entitled to a verdict on the general issue likewise.

Curt v. Lowell, 19 Pick. 25.

When the verdict does not find the issue joined by the parties, in terms, yet, if the court can collect the point in issue, the verdict will be sufficient.

Stearns v. Barrett, 1 Mason, 153.β

(S) Of a Verdict which finds a Matter in a Foreign County.

If the *venue* in an action for a transitory trespass be laid in the county of A, a jury of the county of A may find a verdict in the action; notwithstanding it appear in evidence, that the trespass was committed in the county of B. But it is added, that they are not bound to find a verdict.

Bro. *Attaint.* pl. 104.

The latter part of the doctrine of this book is in another book expressly denied to be law; and it is in the latter laid down, that although a *venue* must in every action be laid in some place, the place is not material in an action for a transitory trespass; and that the jury of the county where the *venue* in an action for such trespass is laid are bound, under the penalty of an attaint, to find the defendant guilty, although it appear in evidence that the trespass was committed in another county.

6 Rep. 47, Dowdale's case. ‖See 2 H. Black. 161; 7 Term R. 243; 1 Saund. 8 a, and the judgment of Abbott, C. J., R. v. Burdett, 4 Barn. & A. 171; Steph. on Plead. 310.‖

In an action of debt against an executor he pleaded *plene administravit*. The plaintiff replied, that the executor had assets at Exeter in the county of Devon. Issue being joined upon the replication, the jury found, that the defendant had assets in Ireland. This was holden to be

(S) Of a Verdict which finds a Matter in a Foreign County.

a verdict for the plaintiff: and by the court,—It is usual for merchants to have a great part of their goods in foreign parts, and God forbid that such goods should not be liable to their debts in England.(*a*)

6 Rep. 47, Dowdale's case. ‖(*a*) Every action of a transitory nature may be laid in any county in England, though the matter arises beyond the seas. *Per* Ld. Mansfield, Mostyn v. Fabrigas, Cowp. 181; and see Melan v. Duke of Fitzjames, 1 Bos. & Pul. 138.‖

It is in the general true, that the jury ought to find every local matter in its proper county.

Bro. *Verd.* pl. 80; 2 Roll. Abr. 688, (M), pl. 1.

But if an action be brought for a local matter in the county of A, and the defendant, by pleading a release in the county of B,(*b*) make it necessary to try the issue concerning the validity of the release in the county of B, the jury of the county of B may assess damages for the local matter in the county of A, it being a maxim of law, that *multa conceduntur per obliquum quæ non conceduntur per directum.*

6 Rep. 47, Dowdale's case; Bro. *Damage*, pl. 53, pl. 103; Bro. *Trial*, pl. 118; 2 Roll. Abr. 687, pl. 1. ‖(*b*) The release being a transitory matter, the plea would now follow the venue in the declaration, and it would be tried in the county of A.‖

If in an action brought in the county of A the general issue be pleaded, the jury of the county of A may find a local matter in any other county, provided the matter be incidental to the issue joined in the county of A.

In an action of debt upon the statute against bargaining for pretended titles, the bargain was alleged to have been made in the county of Norfolk; but the land bargained for was in the county of Suffolk. The defendant pleaded *nil debet*, and issue was joined upon the plea. It was holden, that the jury of the county of Norfolk, who tried the issue, might find the value of the land; because the value thereof is incidental to the issue.

2 Roll. Abr. 688, Pike v. Hassen, 3 Leon. 233. ‖See the case of Way v. Yalley, 6 Mod. 194, 195; Salk. 651, where debt was held to lie on a demise of lands in Jamaica; for it was founded on privity of contract, and might, therefore, be brought anywhere.‖

If in an action of debt brought in the county of A against an heir, he plead *riens per descent*, and issue be joined upon the plea, the jury may find *assets per descent* in any county; because the heir is answerable for all *assets per descent.*

6 Rep. 47, Dowdale's case.

In an action of *detinue* for a release made in the county of A, the plaintiff alleged, that, by reason of the detention of the release, he lost lands in the county of B. The defendant pleaded *non detinet*, and issue was joined upon the plea. It was holden, that the jury of the county of A, who tried the issue, might assess damages to the value of the land: And by the court,—As the loss of the land is laid in aggravation of damages, it is incidental to the issue.

Bro. *Damage*, pl. 87; Jenk. 20, pl. 38.

There seems to be good reason that the jury, who try an issue, should in every case assess damages for a matter in a foreign county, which is laid in aggravation of damages, notwithstanding the matter be local; otherwise a writ must go to a jury of the foreign county to inquire of the damages

(T) Of a Verdict which is contrary to a Matter of Record.

in that county, which would not be so proper; because a jury are not liable to an attaint for a false verdict upon a writ to inquire of damages.
2 Roll. Abr. 688, (L), pl. 3.

If an action be brought in an inferior court, the jury by whom an issue in the action is tried may find any matter incidental to the issue, although it arise out of the jurisdiction of the court.

An action of debt being brought in an inferior court against J S as heir to J N, the defendant pleaded *riens per descent*, and issue was joined upon the plea. The jury found assets out of the jurisdiction of the court, and the plaintiff had judgment. A writ of error being brought, it was assigned for error, that the jury had no power to find assets out of the jurisdiction of the inferior court. The judgment was affirmed: And by the court,—As the matter found out of the jurisdiction of the inferior court is incidental to the issue, the verdict is good.
Cro. Ja. 502, Bourn v. Carrington.

In an action upon the case for words, brought in an inferior court, the plaintiff alleged, that, by reason of the speaking of the words, he lost customers at a place out of the jurisdiction of the court. The defendant having pleaded not guilty, the jury found a verdict for the plaintiff, and assessed damages to the amount of a hundred marks; and judgment was given for the plaintiff. A writ of error being brought, it was assigned for error, that the jury have assessed damages for a matter arising out of the jurisdiction of the court, which it was said they had no power to do. The judgment was affirmed: And by the court,—The jury, by whom an issue is tried in an inferior court, cannot find an original matter, unless the same arose within the jurisdiction of the court; but the verdict is in the present case good; because the matter alleged out of the jurisdiction of the court, which is laid in aggravation of damages, is not an original matter, but incidental to the issue.
Cro. Car. 570, Ireland v. Lockwell. ‖ See 1 W. Saund. 74 b.‖

It is a rule of law, that a jury cannot find a person indicted for an offence guilty, in any other county than that wherein the offence was committed; it being a maxim of law, that *ubi quis delinquit ibi punietur*.
6 Rep. 47, Dowdale's case.

But if J S, who has stolen goods in the county of A, carry them into the county of B, he may be found guilty of larceny in the county of B; for, as the legal possession as well as the property of the goods stolen does, notwithstanding the felonious taking, continue in the person from whom they were taken, every moment's continuance of the illegal possession obtained by the thief is as much a felonious taking as the first taking was; and, consequently, he does, by continuing the illegal possession of the goods in the county of B, become guilty of larceny in that county.
H. P. C. 69; 1 Hawk. c. 33, § 9. ‖By 7 G. 4, c. 64, § 12, where any felony or misdemeanor shall be committed on the boundaries of two or more counties, or within five hundred yards thereof, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined and punished in any of the said counties, in the same manner as if actually and wholly committed therein. And see Archbold's C. L. 3.‖

(T) Of a Verdict which is contrary to a Matter of Record.

EVERY verdict, so far as it is contrary to a matter of record, is bad; because more credit is due to the record than to the verdict.
Bro. *Verd.* pl. 96.

(U) Of a Verdict which is contrary to a Matter of Estoppel.

If the jury find any thing contrary to what one of the parties to the action has confessed, the verdict is as to so much bad; because it is a finding contrary to a matter of record.

Bro. *Verd.* pl. 96.

To a writ of *scire facias* brought against J S as heir to his father, upon a recognisance entered into by his father, he pleaded *riens per descent.* Issue being joined upon the plea, the jury found, that J S had land by descent as heir to his father: and the plaintiff had execution of the land. An action of ejectment being afterwards brought by J S, in order to recover the possession of the same land, the jury found that the land did not descend to J S as heir to his father, but that it came to him as donee in tail upon the death of his father. The verdict was holden to be bad; because, it is contrary to the verdict in the action upon the writ of *scire facias*, it being thereby found that the land did descend to J S as heir to his father.

Palm. 20, Crawley's case, there cited, 1 Roll. R. 443. ‖ The first verdict seems to have been expressly on the point in issue, and between the same parties, in which case a verdict is conclusive. See judgment of De Grey, C. J., 11 Sta. Tri. 261; 22 Howell's Sta. Tri. 588; and see 1 Phillips on Ev. 304, and cases there collected.‖

It is in one book laid down generally, that, if a verdict have been found against a tenant in tail, no one of the issue in tail can falsify the verdict.

1 Roll. R. 443, Crawley v. Morton.

But in another book it is said, that although no one of the issue in tail can falsify a verdict, which has been found against a tenant in tail, directly, he may do it obliquely; as, by showing that the tenant in tail did not give a material thing in evidence, which it is in his power to give.

Ld. Raym. 1050, Traviban v. Lawrence.

If a *venire facias de novo* have been awarded, the first verdict, notwithstanding it be continued upon the record, is a nullity; and, consequently, the second verdict is not bad, although it be contrary to the first.

Cro. Ja. 627, Langley v. Pain.

(U) Of a Verdict which is contrary to a Matter of Estoppel.

It is more proper to plead a matter of estoppel, than to give it in evidence; because, when the matter of estoppel is pleaded, the judgment of the court may be had thereupon without going to trial.

1 Inst. 227.

But a matter of estoppel may be given in evidence; and if such matter be given in evidence, and the jury find contrary thereto, the verdict is bad.

1 Inst. 227; Dyer, 171; 2 Rep. 4; Cro. Eliz. 140; 1 Leon. 206.

‖ But it is now settled that, unless pleaded by way of estoppel, such matter is not conclusive. In a late case of an action on the case for widening a water channel, and thereby damaging the plaintiff's mill, the Court of King's Bench held, that a verdict obtained by the defendant in a former action, which had been brought by the plaintiff for the same cause, was not conclusive as evidence under the general issue, though it would have had that effect if pleaded in bar by way of estoppel. When a judgment is pleaded as an estoppel, the plaintiff will not be allowed to discuss the case with the defendant, and for the second time to vex him by the agitation of the same question; but if the defendant plead not guilty in the second action, he has thereby elected to submit his case to the jury, who are to give their verdict upon the whole evidence submitted to them. The jury upon

(W) Of a Verdict which is contrary to something that is confessed, &c.

the general issue are to try, not whether the plaintiff is estopped from trying the question, but whether the defendant be really guilty of the wrongful act imputed to him.

Outram v. Morewood, 3 East, 354; Vooght v. Winch, 2 Barn. & A. 662.‖

If J S, after having by indenture demised certain premises for a term of years, during the term bring an action of ejectment for the recovery of the possession of the premises, and the indenture be given in evidence, and the jury find contrary thereto, the verdict is bad; because it is contrary to a matter of estoppel: for the jury ought in such case either to find for the defendant, or to find the matter specially.

Cro. Car. 110, Iseham v. Morrice. ‖But see *suprà*.‖

(W) Of a Verdict which is contrary to something that is confessed, or not denied, in the Pleadings.

If the jury find one thing contrary to some other thing, that is confessed, or not denied, in the pleadings, the verdict is as to so much bad; because the jury had nothing to do with that which is confessed, or not denied in the pleadings.

Dyer, 147; 2 Rep. 4; Cro. Eliz. 283; 2 Roll. Abr. 691, R. pl. 1; {3 Cran. 270.}

The tenant in an action of dower pleaded, that the husband of the demandant did not die seised of the estate of which she demanded dower, and issue was joined upon the plea. The jury found that the husband died seised: but they likewise found, thut the estate was not liable to dower. The latter part of the verdict was holden to be bad; because, as the plea does not deny the liability of the estate to dower, it virtually confesses it.

2 Roll. Abr. 691, (R), pl. 2.

If the demandant in an action of waste, wherein the waste is charged in a place called A, plead, that there is no such place as A, and issue be joined upon the plea, and it be found against him, the jury have no power to inquire whether the waste were committed; because the commission of the waste is not denied in the plea.

2 Roll. R. 691, (R), pl. 3.

An action of debt being brought upon a bond, with condition to perform an award to be made by J S, the defendant pleaded, that J S did not make the award alleged by the plaintiff. The plaintiff replied, that J S did make the award: and issue was joined upon the replication. The jury found, that J S did make the award; but they found likewise a matter in avoidance thereof.(*a*) The latter part of the verdict was holden to be bad; and by the court,—The award, as the issue is only whether J S did make it, shall be taken to be good, unless it appear upon the face thereof to be bad; and, as the defendant could not have rejoined any matter in avoidance of the award, because this would have been a departure, the jury had no power to find such matter.

2 Roll. Abr. 690, pl. 10. ‖(*a*) See 1 Salk. 72; 1 W. Saund. 327 b, *acc.; sed* vide 1 W. Saund. 103, note (1), *contrà;* and see 11 East, 188. See *Pleas and Pleadings*, (L), Vol. vii.‖

In an action of debt against an heir, upon the bond of his father, the defendant pleaded, that he had nothing by descent except twenty acres of land in A. The plaintiff replied, that, besides the twenty acres in A, he had forty acres of land by descent in B. The defendant rejoined, that he had not forty acres of land by descent in B, and the issue joined upon

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the rejoinder was found for him. It was holden, that the plaintiff should have judgment, notwithstanding the verdict for the defendant: and by the court,—As the defendant has confessed the having of twenty acres of land by descent, the plaintiff has a right to judgment as to these.

Jenk. 102, Molineux's case.

In an action of replevin the defendant alleged, that the plaintiff held of him by the yearly rent of twelve shillings, and a heriot upon every alienation; and he avowed the taking for a heriot. The plaintiff traversed, that a heriot was due upon every alienation, and issue was joined upon the traverse. The jury found, that the holding was by the yearly rent of three shillings, and a heriot upon every alienation. Upon a motion in arrest of judgment, it was insisted, that the defendant ought not to have judgment; because the tenure found is different from that alleged. Judgment was given for the defendant: and by the court,—It is alleged in the pleadings, that the plaintiff held of the defendant by the yearly rent of twelve shillings, and heriot upon every alienation; and it is a rule of law, that whatever is well alleged in the pleadings, and not denied, shall be taken to be as alleged, notwithstanding the jury find contrary thereto.

2 Mod. 5, Wilcox v. Skipwith.

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β WHEN a declaration or other pleading sets forth a good title or ground of action defectively, the imperfection will be cured by a verdict.

Read v. Chelmesford, 16 Pick. 128; Wheeler v. Train, 3 Pick. 255; Ward v. Bartholomew, 6 Pick. 409; Worster v. Canal Bridge, 16 Pick. 541; Avery v. Tyringham, 3 Mass. 160; Moor v. Boswell, 5 Mass. 306; 7 Mass. 169; United States v. The Virgin, 1 Pet. C. C. R. 7; Farwell v. Smith, 2 Green, 133; Stilson v. Toby, 2 Mass. 521; Coleman v. Craysdale, 3 J. J. Marsh. 541; Dickerson v. Hays, 4 Blackf. 107; Stanley v. Whipple, 2 M'Lean, 35; Gaylord v. Payne, 4 Conn. 190; Spencer v. Overton, 1 Day, 183; Fuller v. Hampton, 5 Conn. 416; Hendricks v. Seely, 6 Conn. 176; Phelps v. Sill, 1 Day, 315; Russell v. Slade, 12 Conn. 455; Story v. Barrell, 2 Conn. 665.g

The want of having set out the writ, which would be bad upon a demurrer, is cured by a verdict: for the court will, in support of the verdict, intend it to have been proved at the trial that there was a writ.

2 Lill. Abr. 797.

But if a writ, which appears upon the face thereof to be bad, is set out, the badness of the writ is not cured by a verdict; for it can never be intended, that such writ was proved to be good.

2 Lill. Abr. 797.

If it be not alleged in the declaration in an action of trespass, that the trespass charged was committed upon a day certain, the declaration is bad upon demurrer. But the omission of such allegation is cured by a verdict; for, as the day is not material in an action of trespass, the court will, in support of the verdict, intend, that the trespass was proved to have been committed upon a day antecedent to the commencement of the action.

Carth. 389, Blackall v. Eale; Salk. 662, S. C.; 5 Mod. 287, S. C. Com. 12.

If a defective title be set out in the pleadings, the defect is cured by a verdict; for the court will, in support of the verdict, intend, that it was supplied by evidence: but, if a bad title be set out in the pleadings, the

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badness is not cured by a verdict: for the court will never intend, that a title, which is apparently bad, was proved to be good.

Plowd. 202; Salk. 365; {2 Mass. T. Rep. 521, Stilson v. Tobey; 1 Day, 183, Spencer v. Overton; Ibid. 186, n.} [So, if the plaintiff wholly omits to state his title; for in that case there is no room for presumption. Dougl. 683;] {1 Johns. Rep. 462, 470, Bayard v. Malcolm; 2 Johns. Rep. 550, S. C.; 1 Saund. 228 c, note by Serjt. Williams.}

{A verdict does not cure a mistake in the nature of the action.

1 Cran. 332, Marine Ins. Co. of Alexandria v. Young. See 1 Cain. 323, Purdy v. Delavan.}

‖ The rule, as deduced from the authorities by Serjt. Williams, is, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proofs of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by verdict, by the common law, or, in the phrase often used, such defect is not any jeofail after verdict. But where there was any defect, omission, or imperfection, though in form only, in some *collateral* parts of the pleading, that were not in issue between the parties, so that there was no room to presume that the defect or omission was supplied by proof, a verdict did not cure them by the common law; but these defects are now cured by the several statutes of jeofails after verdict, and by the 4 Ann. c. 16, § 2, after judgment by default. But still if the plaintiff states a defective title, or totally omits to state any title, or cause of action, a verdict will not cure such defect, either at common law, or by the statute of jeofails; for the plaintiff need not prove more than what is expressly stated in the declaration, or is necessarily implied from the facts which are stated.

1 Will. Saund. 227, and the cases there collected; and see 2 W. Saund. 319 a, b, c.‖

In an action of *assumpsit* upon a bill of exchange there was a verdict for the plaintiff, and judgment was given for him. A writ of error being brought, it was assigned for error, that it is not alleged in the declaration, that the plaintiff did pay the money due upon the bill to the last endorsee; and that, as this is not alleged,(*a*) the plaintiff ought not to recover; because the defendant, unless the money were paid to the last endorsee, is liable to an action for it. The judgment was affirmed: and by the court—After a verdict it shall be intended that the money was proved to have been paid to the last endorsee. It is alleged, that the money was paid upon account of the defendant, which it cannot have been, unless it was paid to the last endorsee.

Carth. 130, Brunetti v. Lewin. ‖(*a*) It was only alleged that the money was paid by plaintiff, not stating to whom.‖

β After a verdict, every *assumpsit* alleged in the declaration is to be taken as an *express assumpsit*.

Insurance Company of Alexandria v. Young, 1 Cranch, 341; Huntingdon v. Todd, 3 Day's Cas. 479.β

In an action of covenant the breach assigned was, that the defendant did not offer to grant an advowson to the plaintiff before he granted it to J S. The defendant pleaded, that he did not grant the advowson to J S, and issue was joined upon the plea. A verdict being found for the

plaintiff, it was in arrest of judgment insisted, that it is not alleged, that the defendant granted the advowson to J S by deed, and, consequently, as no grant of advowson except it be by deed is good, there is not a breach of covenant assigned. Judgment was given for the plaintiff: and by the court,—It shall, in support of the verdict, be intended, that a grant to J S by deed was proved.

Hutt, 54, Lightfoot v. Brightman. ‖See 1 Will. Saund. 227, n. (1), and cases there cited.‖

In another book, wherein this case is cited, it is said, that, as no grant of an advowson, except it be by deed, is good, it is to be presumed, that the jury would not have found a verdict for the plaintiff, unless a grant to J S by deed had been proved.

10 Mod. 301, Muston v. Yateman.

[In an action against an unqualified person for using a gun, the declaration stated, that the defendant used a gun, *being an engine for the destruction of game*. In arrest of judgment it was objected, that it was not averred, that the defendant *used* the gun for the destruction of game, but the court overruled the objection. Lord Mansfield observed, that, according to one way of pointing, the offence was sufficiently charged, and that such an ambiguity, though it might be a good cause of special demurrer, or an objection to a conviction, was cured by verdict.

Avery v. Hoole, Cowp. 825.] ‖See Huntingtower v. Gardiner, 1 Barn. & C. 297.‖

The omission of alleging a matter in the pleadings, which is essential to the action, is never cured by a verdict; because every such matter, it being traversable, must be alleged, that it may be put in issue.

If the declaration in an action of trespass, brought by a master for the beating of his servant, do not charge, that by reason of the beating the plaintiff lost the service of his servant, the omission is not cured by a verdict; the loss of service being the gist of the action.

1 Bulstr. 163, Anon.

The declaration in an action of trespass, brought for keeping a bull accustomed to run at persons, did not charge, that the defendant knew the bull was accustomed to run at persons. It was holden, that the omission is not cured by a verdict; because it is an omission of that which is the gist of the action. As it was not moreover necessary for the plaintiff to prove that the defendant knew the bull was accustomed to run at persons, it not being alleged, the court cannot intend that this was proved.

Salk. 662, Buxendin v. Sharp; Sayer, 282.

{So in an action for a deceit in a sale by a false affirmation, the want of an allegation in the declaration that the defendant made the affirmation *fraudulently* or *knowing it to be false*, is not cured by the verdict; for the *fraud* or *scienter* is the gist of such actions.

1 Johns. Rep. 453, Bayard v. Malcolm; 2 Johns. Rep. 550, S. C.}

[In an action on a bill of exchange against the *endorser*, the plaintiff did not allege notice to the defendant of the refusal by the acceptor, or indeed a demand and refusal by the *acceptor* on the day when the bill was payable. It was insisted, that this was cured by the verdict; that it must be presumed that those facts were proved at the trial. But by the court,—It was not requisite for the plaintiff to prove, either the demand on the acceptor, or notice to the defendant; because they are neither laid in the declaration, nor are they circumstances necessary to any

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of the facts charged. If they were to be presumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promise alleged to have been made by the defendant is an inference of law, and the declaration does not contain premises from which such an inference can be drawn.

Rushton v. Aspinall, Dougl. 679. {Vide 1 Johns. Ca. 99, Leffingwell v. White.}

In an action of debt on 19 G. 2, c. 30, for the penalty of 50*l.* for impressing a mariner in the West India trade, it was not averred in the declaration that he had not deserted from *any* of his majesty's ships of war. A verdict was had for the plaintiff, and upon motion in arrest of judgment for this omission, it was contended by his counsel, that it must be presumed, after verdict, that this was proved at the trial. But by the court,—Nothing is to be presumed after verdict, but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. At the trial it is only necessary to prove what is alleged in the declaration: and here it was only alleged that the mariner had not deserted from a particular ship: therefore we cannot presume, that in this case it was proved he had not deserted from *any* of his majesty's ships.

Spieres v. Parker, 1 Term R. 141.]

{In an action on st. 34 Geo. 3, c. 23, for pirating a pattern for printing calico, the omission of an averment in the declaration, "that the day of first publishing the pattern was printed at each end of the piece of calico" (which, together with the name of the proprietor, is required by that statute, the monopoly being limited to three months from the day of first publishing the pattern,) was holden to be aided by verdict; it being stated in the declaration that the defendants pirated the pattern "within the term of three months from the day of the first publishing thereof, and while the plaintiffs were entitled to have the sole right of printing the same, &c."

7 Term, 518, Macmurdo v. Smith.}

‖ So, where in an action on the case for an injury to the plaintiff's reversion in a yard, the declaration stated injuries in terms which most aptly applied to the possession only, and there was no allegation that the plaintiff had been injured in his reversionary estate, the court, after verdict for the plaintiff, held that the omission was not cured, and the judgment was arrested.

Jackson v. Pesked, 1 Maule & S. 234.‖

So, in debt on the 2 & 3 Ed. 6, c. 1, for not setting out tithes, an omission to state that the tithes had been paid or payable within forty years next before the act, was held fatal after verdict for the plaintiff.

Butt v. Howard, 4 Barn. & A. 655.

Where the declaration alleged that the defendant was assistant overseer, that a rate for relief of the poor was made and duly allowed, and although defendant as such assistant overseer had the rate in his possession, and plaintiff at a reasonable time demanded the inspection of it, and tendered one shilling, yet defendant refused to produce it, whereby he forfeited 20*l.*; it was held, on motion in arrest of judgment, that the count was sufficient; for if the defendant had the rate in his custody *as* assistant overseer, it might be presumed, after verdict, that it was his duty to produce it when lawfully demanded.

Bennett v. Edwards, 8 Barn. & C. 702; 6 Bing. 230, S. C.; and see 8 Barn. & C. 114.

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So, where the plaintiff declared, that in consideration that plaintiff, at defendant's request, would consent to suspend proceedings against A on a *cognovit*, defendant promised to pay 30*l.* on account of the debt on the first of April next, and the declaration averred generally that the plaintiff did suspend proceedings on the *cognovit*, it was held, that after verdict this averment was sufficient, since it must be intended to have been proved that plaintiff either suspended proceedings absolutely or for a reasonable time.

Payne v. Wilson, 7 Barn. & C. 423.

In an action against the Bank of England, the declaration alleged that the plaintiff was lawfully possessed of certain three *per cent.* annuities in the care of the defendants, and standing in their books in the name of the plaintiff, for the purpose, amongst other things, of paying him all dividends which might accrue due in respect of the stock whilst the same should not be transferred in the said books with the authority of the plaintiff; and that the plaintiff was entitled to the stock; and that it had not been transferred in the books to any person by his authority; and thereupon it was the duty of the defendants to pay the plaintiff the dividends whilst the same was not transferred, yet the defendants had not paid them. This declaration was held bad for want of an averment that the dividends had been issued by the government to the bank; since, until they were issued, it was not the duty of the bank to pay them; and there was nothing in the verdict of the jury to remedy the want of such an averment.

Bank of England v. Davis, 5 Barn. & C. 185.

Where the assignee of the reversion sued the assignee of the lessee in covenant for rent, &c., and the plaintiff in his declaration alleged only that the lessor was seised of the tenements, without showing of what estate; this was held, after verdict, sufficient.

Harris v. Beavan, 4 Bing. 646.

Where a declaration on the gaming act alleged that the party lost to the defendant by playing at *rouge et noire*, this was held sufficient after verdict, (on error,) without alleging the money to have been lost by playing *with* him.

Taylor v. Willans, 3 Bing. 449.‖

β When an issue has been tendered but not joined, if the parties proceed to trial, and a verdict be found by the jury, it will be sufficient to support a judgment rendered upon it.

Whiling v. Cochran, 9 Mass. 532.

After a verdict, finding a promise, it will be intended that a consideration was proved.

Hall v. Crandall, Kirby, 402.

The appearance of an infant is cured by the verdict.

Apthorp v. Backus, Kirby, 407.

A verdict cures the want of an averment of notice in an action of *assumpsit*, against a town for maintaining one of its own paupers.

Spencer v. Overton, 1 Day's Cas. 183.

A declaration in *assumpsit*, laying the promise on the day after the test of the writ, but the breach before, is good after verdict.

Bemis v. Faxon, 4 Mass. 263.

(Y) What Mistake in Copy of Issue is cured by Verdict.

Every fact necessary to be proved at the trial, in order to support the declaration, must be taken to have been proved, after the verdict.

Stimpson v. Gilchrist, 1 Greenl. 202.

Where the action is brought to recover foreign money, and the value is not averred, the verdict finding the value in dollars, cures the error.

Brown v. Barry, 3 Dall. 165.

If the declaration on an assignment of a patent right, omit to state the assignment, it is cured by verdict.

Dobson v. Campbell, 1 Sumn. 319.

A declaration which in substance contains all the essentials of a cause of action, is good after verdict.

Schlosser v. Brown, 17 Serg. & R. 250.

When damages are claimed in the declaration for a time after the commencement of the suit, judgment will be arrested on error, but if the time be laid under a *scilicet*, or it is insensible or impossible, the error will be cured by the verdict.

Irvine v. Ball, 7 Watts, 327.

(Y) What Mistake, or Omission, in the Copy of the Issue delivered, is cured by a Verdict.

In the first count, in the copy of the issue delivered in an action of *assumpsit*, instead of its being alleged, that the defendant was indebted to the plaintiff, it was alleged, that the plaintiff was indebted to the plaintiff. The other counts were right, and the mistake in the first count was corrected in the record of *nisi prius;* but it was done without leave of the court. A motion being made to set aside the verdict obtained by the plaintiff, on account of the variance betwixt the copy of the issue delivered and the record of *nisi prius*, it was holden, that, as the variance is not in a thing material to the issue, the verdict is good.

Barnes, 477, Johns v. Smith.

Upon a rule to show cause why the verdict obtained by the plaintiff should not be set aside, it appeared, that in the recital of the writ in the copy of the issue delivered, the defendant, whose name was John, was called James; that in other parts of the copy of the issue delivered he was called John; and that no defence was made at the trial. The rule was discharged: and by the court,—The variance in this case is so immaterial, that no advantage can be taken thereof after a verdict.

MS. Rep. Mather v. Brinker, East. 4 G. 3, in C. B.; ‖2 Wils. R. 243; and see 1 Wils. 160.‖

‖Where a bill was filed against three persons by name, and on entering the finding of the jury on the *postea*, part of the Christian name of one of them was omitted, it was held no ground of error.

May v. Pige, 1 Bing. 314; 8 Moo. 297.‖

These words, *et prædictus querens similitèr*, were inserted in the copy of the issue delivered, in the room of the words, *et prædictus defendens similitèr:* the verdict was holden to be bad.

1 Barnard. 58, Scrimshaw v. Proctor. ‖In a late case this mistake was held amendable after verdict, and not a ground for arresting the judgment. Wright *q. t.* v. Horton, 6 Maule & S. 50; 1 Stark Ca. 400.‖

In the copy of the issue delivered, the name of the defendant was inserted instead of that of the plaintiff, in the joining of issue; but in the

(Y) What Mistake in Copy of Issue is cured by Verdict.

record of *nisi prius* the plaintiff's name was inserted. A motion was made to set aside the verdict obtained by the plaintiff, on account of the variance betwixt the copy of the issue delivered and the record of *nisi prius*. The verdict was holden to be good, because it was general, and there was another issue which was well joined.

Barnes, 475, Thompson v. Simmons.

These words, *and the said plaintiff likewise*, were omitted in the copy of the issue delivered. The plaintiff obtained a verdict: but as the defendant relied upon the materiality of the omission, and made no defence at the trial, a rule was granted to show cause why the verdict should not be set aside. Upon showing cause, it was insisted, that the record of *nisi prius* is right, and that the issue is amendable after a verdict. The rule was made absolute: and by the court,—This is a material variance, and, as the defendant relied upon it, and did not make any defence at the trial, it is fatal.

Burnes, 475, Rye v. Crossman.

In an action, brought by the endorsee of a promissory note against an endorsor, the name of the endorsor was omitted in the copy of the issue delivered, which was in these words, *he the said endorsed*, instead of these words, *he the said J S, endorsed;* but the endorsor's name was inserted in the record of *nisi prius*. The plaintiff obtained a verdict; but, as the defendant relied upon the materiality of the variance, and did not make any defence at the trial, the verdict was set aside.

Barnes, 476, Wreathcock v. Bingham.

These words, *and the said plaintiff likewise*, were omitted in the copy of the issue delivered; but they were inserted in the record of *nisi prius*. Upon showing cause against a rule for setting aside the verdict obtained by the plaintiff, it appeared that one of the counsel for the defendant did at the trial object to the sufficiency of the plaintiff's evidence. This, although no witness for the plaintiff was cross-examined, and although no witness was called for the defendant, was holden to be such a making of defence at the trial as cured the omission.

Barnes, 445, Grave v. Cliff; ‖and see Cowp. 407; 2 Bing. 384.‖

‖Where in trespass there was a variance between the issue delivered and the *nisi prius* record, and the record agreed with the declaration, the court refused to grant a new trial; for the issue delivered was no record, and the defendant need not have accepted it, as it was incorrect.

Jones v. Tatham, 8 Taunt. 634.

And the court made the same determination in a case where it did not appear what were the terms of the declaration; since, if that was right, the defendant ought to have returned the issue for not corresponding with it.

Doe dem. Cotterill v. Wylde; 2 Barn. & A. 472; and see 1 Chit. R. 277; Tidd's Prac. 937.

Where, to a rejoinder concluding with a verification, the plaintiff added the *similitèr*, instead of taking issue on it, and he took the record down to trial, and the defendant obtained a verdict, the court refused to grant a new trial, but amended the record.

Grundy v. Mell, 1 New R. 28; and see Cooke v. Burke, 5 Taunt. 164; sed vide 2 Moo. 215.‖

(Z) Of divers Things, which did not fall properly under any of the foregoing Heads, ‖and herein of Cases where the Defect of the Verdict may be supplied by Writ of Inquiry, or by Amendment.‖

THE question was, whether a verdict, which found a deed *in hæc verba*, found all that was recited in the deed. It was holden that it did not. And by the court,—If it should be holden, that a verdict, which finds a deed *in hæc verba* finds all that is recited in the deed, the jury, who are sworn to find the truth, would, whenever there is a false recital in a deed, find a falsity. It has been observed, that if a deed of bargain and sale, wherein the consideration money is recited to have been paid, be found, it is found that the money is paid; but the observation does not apply, it not being in such case found, that the consideration money is paid; nor is it necessary that this should be found; for, if any sum of money be mentioned in a deed of bargain and sale as the consideration, the deed is good, although the money have not been paid.

Freem. 529, Blackmore v. Cumberford.

The panel of the jury, who were to try an indictment against Willis, was by mistake annexed to the *distringas* upon an indictment for the same offence against Brown; and the panel of the jury, who were to try an indictment against Brown, was by mistake annexed to the *distringas* upon an indictment for the same offence against Willis. The verdicts found in both cases were holden to be bad; because they were found by juries, who had not authority to try the indictment.

1 Barnard. 108, Rex v. Willis and Brown; Cro. Ja. 396.

It is in the general true, that if the jury do not, where damages or costs ought to be assessed, assess either, or both, as the case may require, the verdict is bad.

Trial *per Pais*, 259.

In an action of annuity, the jury found, that so much of the annuity as the plaintiff claimed was in arrear; but they did not assess either damages or costs. The verdict was holden to be defective: and it was likewise holden, that the defect could not be made good, by awarding a writ of inquiry to ascertain the damages and costs. But if in a case, wherein damages, or costs, or both, ought to be assessed, the jury omit to assess either, or both, as the case may require, it is in the power of the plaintiff to make the verdict good, by releasing the damages, or costs, or both.

2 Lill. Abr. 798.

‖The rule, as laid down in Cheyney's case, is, that where the court ought *ex officio* to inquire of any thing upon which no attaint lies,(*a*) the omission of it may be supplied by writ of inquiry: but in all cases where any point is omitted, whereof attaint lies, it shall not be supplied by writ of inquiry; and, accordingly, where, in an action for libel, the defendant pleaded the general issue, and eight special pleas of justification, and the jury at the trial found a verdict for the plaintiff on the general issue and two of the special pleas, without assessing damages, and for the defendant on the other pleas; and the court, on motion to enter up judgment for the plaintiff *non obstante veredicto*, decided that the latter pleas were ill, and awarded a writ of inquiry to assess the damages, and final judgment was entered thereon in the King's Bench, the Court of Exchequer Chamber, on a writ of error, reversed the judgment as to the award of the writ of inquiry and final judgment thereon, and remitted the record to the King's Bench, with a direction for that court to award a *venire de novo* to try

the general issue, and issue joined on the two special pleas found for the plaintiff; holding the verdict on these pleas to be void, because no damages had been assessed.

Cheyney's Ca. 10 Co. 118 a; Clement v. Lewis, 3 Bro. & Bing. 297; S. C. in B. R., 3 Barn. & A. 702. (*a*) The proceedings by attaint are abolished by the jury act, 6 G. 4, c. 50, § 60.

The declaration in an action of trespass charged the selling of the plaintiff's goods. The defendant pleaded that the goods which he had distrained for rent in arrear, were, pursuant to the direction of the 2 W. & M. c. 5, appraised by two persons sworn by the headborough, and that the surplus of the money for which they were sold was, after deducting the rent and charges of the distress, left in the hands of the constable. The plaintiff replied, *De injuriâ suâ propriâ absque tali causâ*. Issue being joined upon the replication, a verdict was found for the defendant. The verdict was set aside; a verdict was ordered to be entered for the plaintiff; and a writ of inquiry was awarded for ascertaining the damages: And by the court,—The present verdict ought not to stand; because it appears, from the defendant's own showing, that the selling of the goods is not justifiable; for, as the constable was present, the headborough had no power to administer the oath to the two appraisers.

Stra. 873, Broom v. Rice. ‖In this case the proper action would now, it seems, be on the case and not trespass, according to 11 G. 2, c. 19, § 19, and 11 East, 395.‖

In an action of replevin, the defendant avowed the taking of the goods for the sum of thirty-six pounds in arrear for rent. The plaintiff as to twelve pounds, parcel of the thirty-six pounds, pleaded payment; and as to the residue he pleaded, that it was not in arrear. Issue being joined upon both pleas, the first issue was found for the plaintiff, the second for the defendant. Judgment was given for the defendant: And by the court,—If one issue in an action of replevin be found for the defendant, he is entitled to a return of the goods; and, consequently, the finding of another issue for the plaintiff is nugatory.

Cro. Ja. 473, Dent v. Parso.

In an indictment upon the statute against stabbing, tried at the Old Bailey, the jury found a special verdict, in which the question submitted to the court was, whether the prisoner was ousted of the benefit of the clergy? The verdict being by the command of the king referred to the judges, it was argued before them at Serjeant's Inn. Six of the judges were of opinion that the prisoner was ousted of the benefit of the clergy; but the other five were of a contrary opinion; and the recorder was likewise of opinion that the prisoner was not ousted of the benefit of the clergy. The king being himself of the same opinion, the prisoner had the benefit of the clergy.

3 Lev. 254, Rex v. Hunter; ‖1 East, P. C. c. 5, § 25. Benefit of clergy is abolished by stat. 7 G. 4, c. 28, § 6.‖

[It hath been laid down, that the court will not alter a general verdict, unless it clearly appear upon the face of it, that the alteration will be agreeable to the intention of the jury; the proper remedy in such case being a new trial.

Spencer v. Goter, 1 H. Bl. 78.

But, where it appeared from the affidavit of eight of the jurors that the foreman had made a mistake in the delivery of the verdict, and had re-

(Z) Things not comprised in the foregoing Heads.

ported both issues to be found for the defendant, whereas they had agreed to find one of them for the plaintiff, the court intimated a disposition to grant a rule to show cause, (but the cause was not afterwards moved,) why the verdict should not be amended and set right according to the truth of the finding.

Cogan v. Ebden, 1 Burr. 383. ‖But that the court cannot receive such affidavits, see Owen v. Warburton, 1 New R. 329; and see 2 Stark. 111; 8 Taunt. 26; 3 Bro. & B. 272.‖

When a considerable time has elapsed after the trial, *the court will not amend the* postea *by increasing the damages* given by the jury, although all the jurors join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived the verdict they have given was calculated to give him such increased sum. The proper time for such an explanation is at the trial.

Jackson v. Williamson, 2 Term R. 281.]

{Where a verdict is taken *pro forma* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the court for leave so to do.

1 East, 401, Lee v. Lingard; 3 Bos. & Pul. 244, Borrowdale v. Hitchener; 1 Bos. & Pul. 97, Higginson v. Nesbit; Ibid. 480, Grimes v. Naish.}

‖Nor will the court, after a lapse of eight years, and where the judgment has been reversed for defect in one count, entertain a motion for entering the verdict on particular counts, according to the judge's notes.

Harrison v. King, 1 Barn. & A. 161.

Nor will they amend a verdict according to the notes of an arbitrator, since they have no power to compel such notes to be brought before them.

1 Chitt. R. 283.‖

β It is misbehaviour in the jury to take refreshments, after they are sent out, and before they render their verdict, without leave of court; but the verdict will nevertheless stand, unless such refreshments were furnished by the party in whose favour they find.

Harrison v. Rowan, 4 Wash. C. C. R. 32.

A verdict may be amended, when there is a mistake in the form.

Jones v. Vanzandt, 2 M'Lean, 612.

Where there are several counts in the declaration, some of which are for demands not within the jurisdiction of the court, and the jury find a general verdict, it is bad for the whole.

Kline v. Wood, 9 S. & R. 294.

A verdict may be taken after the death of a sole plaintiff, if the death happens after the first day of the circuit.

Besas v. Merzereau, 18 Wend. 653.

A verdict of one mill is a nullity, on which no judgment can be entered.

Brown v. Smith, 3 Caines, 81.

Where the jury is sworn to try the issue, when in fact there is no issue joined, the verdict has no effect.

4 Bibb, 341.

When a verdict is given in sterling money, and the rate of such money in United States currency is established by act of Congress, it is the

(B) In what Cases Venue is necessary.

duty of the court to reduce the sum to, and record it in United States money.

Beal v. M'Kiernan, 8 La. R. 572.

After a verdict, it is too late to object that the jury process has been altered without proper authority, being, at most, it seems, an irregularity.

Dubois v. Keat, 8 Ad. & Ell. 485, n.

When the plaintiff succeeds in trover only as to part of his claim, the defendant has a right to have the verdict entered distributively.

Williams v. Great Western Railroad Company, 1 Dowl. N. S. 16.g

VISNE OR VENUE.

(A) Venue, what.

(B) In what Cases Venue is necessary.

(C) How the want of a Venue may be aided.

(D) What deemed a proper laying of the Venue: ‖And whence the Venue shall come.‖

(E) In what Cases Venue may be changed. Wherein,

1. *When the Motion for changing the Venue must be made.*
2. *The certainty required in the Affidavit on which the Motion is made.*
3. *Cases in which the Venue cannot be changed.*

(A) Venue, what.

THE *venue*, in Latin *vicinetum* or *visnetum*, is the place from whence a jury are to come for the trial of causes, which is generally some neighbouring place, *locus quem vicini habitant*, from whence it is called, *vicinetum* or *venue*.

(B) In what Cases Venue is necessary.

THE most general rules respecting the necessity of a *venue* are—That a *venue* is necessary in all cases where the matter is traversable, or where it affects the *right* of the action; where it merely regards the *person*, or concerns damages only, there, a *venue* is not necessary. But these rules will be better understood by consideration of the following cases.

In an action on the case, the defendant pleaded in abatement, that the plaintiff was an alien enemy, and laid no *venue:* and on demurrer it was adjudged to have been well pleaded, and the plaintiff might have replied, that he was born in England generally. But, if such a matter is pleaded in bar, it must be pleaded with a *venue*, and the plaintiff should reply, that he was born in such a place in England, and in the principal case judgment was given, *quod billa cassetur.*

2 Ld. Raym. 1243, Pie v. Cooper. The reason of this distinction is, because that every plea concerning the person which is pleaded in abatement is triable where the action is brought; but, where such plea is pleaded in bar of the action, the *venue* shall be alleged, because such plea is not to the *person* but to the *right*. 2 Ld. Raym. 853; West v. Sutton.

(B) In what Cases Venue is necessary.

βA plea in bar, admitting the note declared on, cannot depart from the *venue* in the declaration, and need not therefore give one, *ut semb.*
Furman v. Haskin, 2 Caines, 370.g

Matters touching the person, as privilege of attorney, may be pleaded without a *venue*, and be tried where the writ is brought.
2 Ld. Raym. 1172, 1173, Scawen v. Garret.

In covenant against one as assignee, there is no need of laying any *venue*, because an assignment is always intended to be made on the lands assigned.
Per cur. Carth. 256, Huckle v. Wye.

‖In a plea in abatement that another is not joined as defendant, a *venue* is unnecessary.
Neale v. De Garay, 7 Term R. 243; 1 Will. Saund. 8 a; Steph. on Plead. 306.‖

But a consideration executory is *traversable*, and therefore a *venue* must be laid.
Cro. Eliz. 880, The Lady Shandos v. Simpson.

Where the judgment is upon a *nil dicit*, the want of a *venue* is not material to set it aside, because the inquiry is not to be of any thing besides damages, which may be inquired by any jurors in the county.
1 Lutw. 235, Remington v. Tailor.

‖Where a request by the plaintiff is necessary to be alleged, and it is alleged without a *venue*, (there being a general *venue* in a preceding part of the declaration,) the omission cannot be taken advantage of in arrest of judgment, since the stat. 4 Ann. c. 16, §1; for it is matter of form objectionable only on special demurrer; and this although the judgment passed by default, on which an inquiry was executed.
Bowdell v. Parsons, 10 East, 359.‖

[In debt for goods sold and delivered, the plaintiff declared that the defendant, *at Westminster in the county of Middlesex, was indebted to him* in a certain sum for goods sold and delivered, but alleged no express contract, or place where the contract was made.
Emery v. Fell, 2 Term R. 30.

On a special demurrer for these causes, the court held the contract and *venue* well laid.

In a replication to a plea of *ne unques accouple* in a writ of dower. alleging a marriage in Scotland, it is not necessary to state by way of *venue* that the marriage was had at any place in England. In point of substance, the question on the marriage in Scotland arising incidentally in a suit in dower, of which the court have original jurisdiction, is for the purpose of the cause within their jurisdiction, without the assistance of a fiction; and the *venue* for the mere purpose of trial, being necessarily the *venue* laid in the declaration, the inserting it in the replication would be nugatory; and the want of it, therefore, cannot be taken advantage of even on a special demurrer.
Ilderton v. Ilderton, 2 H. Bl. 145.]

βIn Massachusetts, a *venue* is required, and a declaration without one is bad, on special demurrer.
Briggs v. Nantucket Bank, 5 Mass. 94.

But the *venue* in the margin, where no *venue* is laid in the declaration, is sufficient.
State v. Post, 9 Johns. 81.g

(C) How the want of a Venue may be aided.

It is a general principle, that the want of a *venue* is only curable by such plea as admits the fact for the trial whereof it was necessary to lay a *venue*, or by a verdict.

6 Mod. 222, Boisloe v. Bailey; 3 Salk. 381, Anon.

Thus, the want of a *venue* is aided by pleading over: as, where in trespass the defendant pleaded a submission to an award, and that an award was made, which he had performed, but laid no *venue* where the performance was. The plaintiff replied another award, and the defendant tendered issue upon it, whereupon plaintiff demurred. Holt, C. J., said, that the want of a *venue* was aided by the pleading over.

2 Ld. Raym. 1039, Purslow v. Baily.

So, in debt upon bond, though no *venue* is laid where the bond was made, yet, if the defendant pleads a release, this admits the bond, and aids the want of a *venue; per* Holt, C. J. But if defendant had demurred, the want of a *venue* had been ill.

2 Ld. Raym. 1039, Purslow v. Baily.

By the 16 & 17 Car. 2, c. 8, the want of a *venue* is aided after verdict; and this in cases not only where there is a wrong *venue*, but also where the cause is tried in a wrong county, as appears from the cases in the margin.

16 & 17 Car. 2, c. 8; 1 Saund. 246, Craft v. Boite; S. C., Raym. 181, by the name of Craft v. Winter. And it is there added, that the defendant might have demurred upon it. ‖ See Mayor of London v. Cole, 7 Term R. 583.‖

‖ But where in ejectment for lands in Cardiganshire the *venue* was awarded out of Shropshire, upon a suggestion of its being the next English county, the court, after a verdict for the plaintiff, arrested the judgment on the ground of a mistrial, Herefordshire being the next adjoining English county to South Wales; although it appeared that Shropshire was in fact nearer to the lands in question, and the cause might be more conveniently tried there than in Herefordshire.

Goodright v. Williams, 2 Maule & S. 270.

But the court in such case will not set aside the verdict for a mistrial, the question being upon the record.

Ambrose v. Rees, 11 East, 370.‖

(D) What deemed a proper laying of the Venue: ‖ And whence the Venue shall come.‖

Many niceties which were formerly to be observed with respect to laying the *venue*, are now removed by the 4 & 5 Ann. c. 16, which enacts, "That every *venire facias* for the trial of any issue in any action or suit, shall be awarded of the body of the proper county where such issue is triable."

4 & 5 Ann. c. 16; and see 24 G. 2, c. 18, which extends this act to trials of issues on penal statutes.

For example, the *venue* in the declaration was laid at Leek, and not at Leek in the county aforesaid. Defendant demurred, and showed the want of a proper *venue* for cause; plaintiff joined in demurrer; and upon argument the court gave judgment for the plaintiff. It was held sufficient, according to the course of the court, to lay the *venue* at Leek, which has reference to the county in the margin; and since by act of parliament the *venire facias* is to be awarded *de corpore comitatûs*, it is not necessary that any particular place in the county be laid.

Barnes, 481, Spooner v. Milward.

(D) What deemed a proper laying of the Venue, &c.

β In an action of slander, the declaration was entitled Dauphin county, ss. It stated that the defendant on the 5th of July, 1814, at Cumberland county, to wit, at the county of Dauphin aforesaid, in a certain discourse which he then and there had, of and concerning the plaintiff, and of and concerning the murder of a certain J S, who before that time was killed and murdered, he, the said defendant then and there uttered, &c. Held, good after verdict.

Wills v. Church, 5 S. & R. 190.γ

‖ In a declaration in *assumpsit* it is enough to allege the county for *venue* without any parish.

Ware v. Boydell, 3 Maule & S. 148.‖

It is a general rule likewise, that the county in the margin of a declaration will help the *venue* laid in the body of it, but will not hurt it, as appears from the following case:

In the margin stood the word Norfolk, in the body of the declaration the *venue* was laid at the city of Norwich, in the county of the same city throughout. The plaintiff executed a writ of inquiry of damages, directed to the sheriffs of the city of Norwich. Had no *venue* been laid in the body of the declaration, reference must be had to the margin; but where a proper *venue* is laid in the body of the declaration, *the word in the margin shall not vitiate it,* for it is a *jeofail* which is helped by the 4 & 5 Ann. c. 16.(*a*)

Barnes, 483, Howse v. Haselwood. ‖(*a*) See 10 East, 359.‖

[In debt upon bond by an administrator, the declaration alleged, that administration was granted by the Bishop of Lichfield and Coventry, and the *venue* in the margin was laid in London, but the bond was stated tc be made at Derby, which is within the diocese. The plaintiff demurred generally. The court held it well enough on a general demurrer, though there possibly might have been some doubt on a special demurrer. The *venue* being laid at Derby in the body of the declaration, the addition of London in the margin did not vitiate it.

Mellor v. Barber, 3 Term R. 387.

Where the proper *venue* is stated in the margin of the declaration, and the *venue* in the body of the declaration is laid at D, without showing in what county D is, or at D in the *county aforesaid*, when the next antecedent county is S, in either of these cases the reference shall be to the *venue* in the margin.

Sutton v. Fenn, 3 Wils. 339; Shirley v. Sackville, Cro. Eliz. 465; Quarles v. Searle, Cro. Ja. 96.]

It is to be observed, however, that in all *real* actions the *venue* ought to be laid in that county where the thing is for which the action is brought; for being *local*, it is only triable there; whereas matters which are *transitory* may be tried in any county, as will more particularly appear when we come to consider in what cases the *venue* may be changed.

2 Lill. Abr. 782.

So likewise, in an action of debt brought for rent due for land upon a lease under hand and seal, where there is no privity of contract, as against an assignee, &c., the *venue* must *not* be laid out of the county where the land lies for which the rent is due; for the action is, for want of privity of contract, become a *local* action, *ratione terræ*, out of which the rents are issuing, and *not transitory;* but where the action is brought by the

lessor against the lessee, there being privity of contract, the action is *transitory*, and the demise may be laid to be made in any other county than that where the land lies.

2 Lill. Abr. 782, 783; 1 Wils. 165. ‖And the assignee of the reversion may bring debt or covenant against the lessee in any county; for the privity of contract is transferred by 32 H. 8; 1 Will. Saund. 241 d.‖

With respect to criminal cases, it is ordained by the stat. 21 Jac. 1, c. 4, that all informations on penal statutes shall be laid in the counties where the offences were committed. And upon this statute the following points have been adjudged.

In an information on the 5 & 6 Ed. 6, c. 14, for buying and selling live cattle contrary to the statute, it was insisted, that the information ought to have been brought in Norfolk where the offence was committed, and not in Middlesex. And Holt, C. J., said, that ten judges had agreed in the following resolutions:—

First, That the 21 Jac. 1, c. 4, does not extend to any offence created *since* the statute, so that prosecutions on subsequent penal statutes are not restrained thereby; but that statute is, as to them, as it were repealed *pro tanto*.

1 Salk. 372, 373, The King v. Gaul.

Secondly, That all informations and popular actions on penal statutes made *before* that act, must by force of 21 Jac. 1, c. 4, be laid, brought, and prosecuted in the proper county where the fact was done. Again,

An information was laid on the 12 Car. 2, c. 32, for carrying wool on board in order to export it; and it was objected, that it ought to have been laid where the offence was committed. But the Lord Chief Baron said, that the statute Jac. 1, does not extend to any offence created since; and therefore it must now stand on the statute Car. 2: there are no negative words in it, so it does not take away the prerogative of the crown to lay it any where, and this at the common law would be *transitory;* and he overruled the objection.

Bunb. 236, Attorney-General v. Browse. But see 4 Inst. 173, where Lord Coke, in his comment on this act, says, that it is but in affirmance of the true institution of the common law: for *vicini vicinorum facta præsumantur scire.*

‖ The offence of selling coals as of a different description from what they really are, contrary to the 3 G. 2, c. 26, § 4, is complete in the county where the coals are *delivered*, and not where they are contracted for; and the *venue* must be laid in the former county. But the offence of not *justly measuring* such coal according to the thirteenth section of the act, is complete at the place where the coals are kept for sale; at which place the bushel of Queen Anne is required to be kept and used for measuring coals.

Butterfield *q. t.* v. Windle, 4 East, R. 385.

In an action of debt on the pilot act, 52 G. 3, c. 39, § 34, for penalties for continuing in charge of vessels without being licensed, and after a pilot had offered, the *venue* must be laid in the county where the offence is committed.

Barber v. Tilson, 3 Maule & S. 429.

And so also in debt on the stat. 43 G. 3, c. 84, § 12, against a parson for the penalty for wilfully absenting himself from his benefice. *Alitèr* in an information on 24 G. 2, c. 19, for being both a tanner and shoemaker.

Whitehead v. Wynn, 5 Maule & S. 427; 3 Anst. 871.

(D) What deemed a proper laying of the Venue, &c.

Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened in the proper county where the *venue* is laid.

Robinson v. Garthwaite, 9 East, R. 296.

A *scire facias* on a recognisance of bail, taken in open court in the King's Bench, is properly suable in Middlesex, where the record is, though all the previous proceedings were in London; and it seems that it could not be sued elsewhere than in Middlesex.

Coxeter v. Burke, 5 East, R. 461; and see Hartley v. Hodson, 2 Moo. 66.‖

It is ordained by the statute 21 Jac. 1, c. 12, that all actions brought against any officers of justice shall be laid in the county where the fact was committed.

For the construction on this act, see Vaughan, 113, and *sequent.*

It is observable, however, that the action is only confined to the proper county where the officer is acting in execution of his office.

1 Stra. 446.

[The 9 G. 2, c. 35, § 26, which enacts, that prosecutions for assaults on revenue officers may be tried in any county, is confined to assaults on them merely as officers, and whilst they are officiating as *such.* And, therefore, where a defendant had been acquitted on all the counts in the indictment, which charged him with assaulting the prosecutor, a revenue officer, in the exercise of his office, and found guilty only on that which charged him with a common assault, judgment was arrested, though the prosecutor in that count was described to be an excise officer, the offence being laid in Surry, and the *venue* in Middlesex.

4 Term R. 490, Rex v. Cartwright.

If an act of parliament directs that officers shall be sued for any act they may do under *that* act in the county where the fact is committed, and a subsequent act gives those officers several of the privileges conferred by the preceding act, but does not require, as the preceding act does, that the action shall be brought in the county where the fact was committed, this privilege will not attach upon the subsequent act, unless there be a reference from the one act to the other, so as to incorporate them.

Bazing v. Skelton, 5 Term R. 16.]

The general rule of law as laid down by Lord Coke is, that every trial shall be out of that town, parish, or hamlet, or place known out of the town, &c., within which the matter of fact issuable is alleged, that is most certain and nearest thereunto, the inhabitants whereof may have the better and more certain knowledge of the fact. But the learning on this head is greatly abridged by the statute 4 & 5 Ann. c. 16, and 24 G. 2, c. 28, which are taken notice of under the last head. For, by these statutes it is enacted, that every *venire facias* for the trial of any issue in any action or suit, or upon any penal statute, shall be awarded of the body of the proper county (*a*) where such issue is triable.

1 Inst. 125 a; 4 & 5 Ann. c. 16; 24 G. 2, c. 18. Before these statutes, where the *venue* could not come from a vill, hamlet, or *lieu conus*, there it might have been *de corpore comitatûs.* ‖(*a*) And therefore it is now sufficient to state the county generally in the declaration, without any place. Ware v. Boydell, 3 Maul. & S. 148.‖

It may therefore be sufficient to consider, out of what county the *visne shall come*, where part of the matter to be tried is part in one county and part in another.

2 Lill. Abr. 786.

(E) In what Cases the Venue may be changed.

This will depend on the gist of the issue, as may be collected from the following cases:

An action was brought for goods esloined, and received by the defendant, and the tort of the esloining is alleged in one county, and the receipt of them by the defendant in another county, and they are at issue if he received them or not: there the *visne* shall be of the county where the receipt is supposed.

Bro. *Visne*, pl. 94.

In trespass, the defendant assumed in London to cure the wound of the plaintiff, &c., and applied contrary medicines in Middlesex, by which the plaintiff was impaired. *Per* Thirn,—If they take issue upon the *assumpsit*, *visne* shall be of London; and if of the contrary medicines, then of Middlesex.(*a*)

Bro. *Visne*, pl. 117. It may be added as a general rule, that in all cases where the action is founded upon two things, both of which are material or traversable, and the one without the other will not maintain the action, there the plaintiff may bring the action in which of the counties he will. 7 Rep. 2 a, Bulwer's case; [2 Term R. 238, S. P.] ‖ Mayor of London v. Cole, 7 Term R. 583, *acc.* (*a*) But now the general issue, *non assumpsit*, would be pleaded, putting in issue the whole declaration; and the matter being transitory, the cause would be tried in the county where the plaintiff had laid his *venue*.‖

‖ In case where the injury is to the soil, the *venue* must be laid in the county where the injury arises; as where a trench cut in the county of N, overflowed and damaged the plaintiff's lands in the county of W, and an act required the action to be brought where the cause of action arose, it was held the action might be brought in W.

Sutton v. Clarke, 6 Taunt. 29; and see Warren v. Webb, 1 Taunt. 379.‖

In some cases, however, the *venue* shall come out of both counties. For which, see Bro. *Confess.* and *Avoid.* pl. 30, or 38 H. 6, p. 25, where the case is more full and correct.

But where both counties cannot join, there, it is said, it may be tried in either county.

2 Roll. Abr. 603, pl. 8.

‖ In an action on the stat. 1 & 2 Phil. & Mar. c. 12, for driving a distress out of the hundred into another county, the *venue* may be laid in either county.

Pope v. Davis, 2 Taunt. 252; and see Cro. Eliz. 646.

But where an usurious contract is made in one county, and the money received in another, here the *venue* in an action for penalties must be laid in the county where the money is received; for there is no offence in the county where the mere contract is made.

Pearson v. M'Gowran, 3 Barn. & C. 700; and see Rex v. Buttery, cited 4 Barn. & A. 179.‖

(E) In what Cases the *Venue* may be changed.

THE general principles with respect to the changing of the *venue* may be found under *Actions local and transitory* (B), vol. i. It may be necessary however to consider farther,

1. *When the Motion for changing the* Venue *must be made.*

It has been held that the defendant must move to change the *venue* before he pleads; and that the plaintiff in like manner must move to dis-

charge the rule, on his undertaking to give material evidence, before defendant replies.

2 Stra. 858, Dickenson v. Fisher.

But a judge's summons or order for time to plead, shall be no bar to a motion for changing the *venue*.

Per cur. Barnes, 489, Dennis v. Fletcher.

So likewise, where after a rule to show cause why the *venue* should not be changed, and before it was made absolute, the defendant by inadvertence put in a plea, yet the court held that this was no waiver of the rule; and they allowed defendant to withdraw his plea on payment of costs, and made the rule absolute for changing the *venue*.

Barnes, 492, Herbert v. Flower et al.

Neither is a judge's order for an imparlance any bar to a motion for changing the *venue*.

Barnes, 467, Blackstock v. Payne.

[The *venue* may be changed, after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead, where the terms are to plead issuably and take short notice of trial at the first sittings in London or Middlesex, because there a trial would be lost.

Cowp. 511; ‖7 Term R. 698;‖ Barnes, 493; 1 Wils. 245, *contrà*. ‖See Tidd's Prac. 659, (8th edit.)‖

The plaintiff was allowed to bring back the *venue* to the county where it was originally laid, upon the usual undertaking, though the cause had gone down to trial, and been a remanet for want of jurors.

Cowp. 409, Brucshaw v. Hopkins.]

β When the plaintiff wishes to change the *venue*, he must move to amend, and a suggestion must be entered on the record.

Lee v. Kaighn, Coxe, 283.

The motion will not be changed, if the motion for that purpose is not made until after issue joined, and it appears that the plaintiff, if successful on the trial, would lose a term in entering his judgment, should the motion be granted.

Lee v. Chapman, 11 Wend. 186.

But the defendant may apply to have the *venue* changed after issue joined, provided a trial has not been lost, and it will occasion no delay.

Delavan v. Baldwin, 3 Caines, 104; Rent v. Dodge, 3 Johns. 447; but Wistan v. Johnson, Coxe, 260.g

2. *The Certainty required in the Affidavit on which the Motion is made.*

With respect to the affidavit, it must be positive and certain. It is not sufficient that it be affirmative, but it must also contain negative words; that is, it is not enough for defendant to swear that the *cause of action*, if any, did arise in the county to which he would have the *venue* changed, but he must likewise add, that it did *not* arise in the county laid in the declaration, or *elsewhere* out of the county to which he would have the *venue* changed.

Barnes, 478, Belshaw v. Porter. The words, *cause of action*, are indispensably necessary, for it would be insufficient to swear that the promises in the declaration were made in such a county. Barnes, 477, Cole v. Gouing; S. P., 2 Barnardist. 74, White v. Love, [3 Term R. 495.]

(E) In what Cases the Venue may be changed.

Where there are several defendants, the affidavit of one is sufficient to ground a motion for changing the *venue*.

Barnes, 482, Box v. Read. ‖See as to the affidavit, Tidd's Prac. 609, (9th edit.)‖

β Hearsay evidence is insufficient to support a motion to change the *venue*.

Lee v. Kaighn, Coxe, 283.

The special circumstances on which the motion is founded must be made out by the affidavit.

Ker v. Whitaker, 2 Penning. 514.

It is not required that the *venue* should state the cause of action is not transitory; if it be not transitory, it should be shown by the other side.

Baker v. Sleight, 2 Caines, 46.

The affidavit of the defendant to change the *venue* must be positive, if he swear merely to his belief, it will not be sufficient.

Franklin v. Underhill, 2 Johns. 374.

Such affidavit must be direct and positive, that the cause of action arose in another county, this must not be stated argumentatively.

Manning v. Downing, 2 Johns. 453.g

3. *Cases in which the* Venue *cannot be changed.*

With regard to the cases in which the *venue* cannot be changed, though it has been held that the *venue* may be changed in all actions of a transitory nature, yet there are divers exceptions, as in cases of privilege, specialty, promissory note, or bill of exchange, ‖awards, charter-parties of affreightment, unless some special ground be laid.(*a*) *Alitèr* in actions on policies of assurance.(*b*)‖ To which may be added, that even in the case of persons privileged in this respect, such as barristers or attorneys, if they are joined in an action with unprivileged persons, they cannot change the *venue*.

Per cur. Barnes, 491, Everest v. Sansum; 5 Taunt. 576; 1 Stra. 610, Townsend v. Duppa et al. (*a*) ‖2 Bos. & Pul. 355; 7 Taunt. 306; 1 Term R. 781; 3 Barn. & C. 9, 552. (*b*) 2 Term R. 275; 7 Term R. 205.‖ βFor cases when the *venue* will not be changed, see Low v. Hallet, 2 Caines, 374; Gourley v. Shoemakers, Colem. 103; Clinton v. Crosswell, 2 Caines, 245; New Windsor Turnpike v. Wilson, 3 Caines, 127; Stoutenberg v. Legg, 2 Johns. 481; Worthy v. Gilbert, 4 Johns. 492.g

β In an action of covenant, for the breach of covenant of seisin, the *venue* cannot be changed to the county where the lands lie, without an affidavit of special circumstances.

Ward v. Holmes, 2 Halst. 171.

The *venue* cannot be changed after issue joined.

Wistan v. Johnson, Coxe, 260.

The *venue* will not be changed on the application of one defendant, when there are several defendants in a cause.

Sailly v. Hutton, 6 Wend. 508.g

Neither is the *venue* in any case ever changed into a *county palatine*. ‖ The *venue* has been frequently changed into a *county palatine;* but the courts require an undertaking from defendant not to assign error for want of an original; and in the C. B. the court will not change it, if inconvenient to the plaintiff, nor on application by one of several defendants.‖(*a*) The

court have likewise refused changing it into Durham: and have also rejected a motion for changing it from Yorkshire into the city of York.

Barnes, 488, Richardson v. Walker; Barnes, 289, Lewis v. Askam; Barnes, 481; Craster v. Cockerell. ‖(a) 7 Term R. 735; 1 Wils. 222; 1 Taunt. 120; Ibid. 432; 5 Taunt. 87; and see Ibid. 631; 4 Maule & S. 233; 7 Taunt. 466; 2 Chit. R. 417, 418; Tidd's Prac. 607, (9th edit.)‖

[In an action for infringing a patent, the *venue* cannot be changed from Middlesex to another county, because it is impossible for the party applying to make the necessary affidavit, that the cause of action arose wholly in such other county, and not elsewhere, it being manifest that the *substratum* of the action, namely, the patent, is at Westminster.

Cameron v. Gray, 6 Term R. 363.]

‖ And in transitory actions, where material evidence arises in two counties, the *venue* may be laid in either.

2 Term R. 275; 7 Term R. 583.

And if it be laid in a third county, the courts will not change it; for the defendant cannot, in such case, make the necessary affidavit, that the cause of action arose in a particular county, and not elsewhere.

7 Term R. 205; 3 Bos. & Pul. 579; 3 Taunt. 464; Tidd's Prac. 652, (8th edit.)

And when the cause of action arises out of the realm, the courts will not change the *venue*, because the action may as well be tried in the county where the *venue* is laid, as in any other, where the cause of action did not arise.

Cowp. 176; 1 H. Bl. 280; 1 Taunt. 259; 2 Taunt. 197 6 Taunt. 569; 4 East, 495; 2 New R. 397.

Nor in an action for a libel, written in one county, and circulated in another.

1 Term R. 571, 647; 1 Brod. & Bing. 299.

But it may be changed to the county in which the libel was both written and published.

3 Term R. 306.

And in an action on the case for overturning the plaintiff in a stage-coach, the *venue* may be changed into the county where the accident happened.

4 Taunt. 729.

And it is no reason against changing the *venue*, that if changed the cause is likely to be tried by persons interested in the question, if they are likely to have as strong an interest on one side as on the other.

5 Taunt. 605.

Though the courts, in general, will not change the *venue* when it is laid in the proper county, yet they will change it even then upon a special ground.

1 Term R. 781; 1 Bos. & Pul. 20, 425; 3 East, 329; 8 Taunt. 635; Tidd's Prac. 655; 1 Chit. R. 324.

But in an action by an attorney for an escape, it is not a sufficient ground for deviating from the general rule not to change the *venue*, in such case that the witnesses on both sides reside in the county to which the *venue* is wished to be changed.

2 Marsh. 152.

Though the courts will, in general, change the *venue* where it is not laid

(B) What Acts are absolutely void.

in the proper county, yet if an impartial or satisfactory trial cannot be had there, they will not change it; as, in an action for words spoken of a justice of the peace by a candidate on the hustings at a county election.

Cowp. 510.

And in order to avoid delay, the courts will not change the *venue*, except by consent, or upon an affidavit of merits, into the city of Bristol or Norwich, (where there are no Lent assizes,) in Michaelmas or Hilary term.

Barnes, 481; 1 Wils. 138; 11 Price, 613; *sed* vide 1 Chit. R. 334; 11 Price, 742. See further as to cases where the *venue* may and may not be changed, Tidd's Prac. vol. 1, c. 24, (9th edit.); Archb. Prac. vol. 2, p. 193, (2d edit.)‖

VOID AND VOIDABLE.

In the law, some acts are absolutely void, and others are voidable only; for the better understanding whereof, it is necessary to consider,

(A) The Distinction between void and voidable.

(B) What Acts are void; wherein, of the Degrees in which Acts may be void, as,

1. *What Acts are absolutely void as to all Purposes.*
2. *What void as to some Purposes only.*
3. *What as to some Persons only.*
4. *How Acts void by Operation of Law may be made good by subsequent matter.*

(C) What Acts are voidable only.

(D) How voidable Acts may be made good.

(E) How they may be avoided.

(F) By whom they may be avoided.

(A) The Distinction between void and voidable.

A THING is void which was done against law at the very time of the doing it, and no person is bound by such an act; but a thing is only voidable which is done by a person who ought not to have done it, but who nevertheless cannot avoid it himself after it is done; though it may by some act in law be made void by his heir, &c.

2 Lill. Abr. 807. [The doctrine in the text as to voidable acts is far from being universally just. It does not hold in the case of infants. An infant, when he comes of age may himself avoid a voidable act done by him in his infancy.] §See Bouv. L. D. v. *Void;* Id. v. *Voidable.*§

(B) What Acts are absolutely void.

ACTS, it is said, may be void in several degrees, according to the particular circumstances of the case.

Cart. 19, Keite v. Clopton.

It will be proper, therefore, to consider,

(B) What Acts are absolutely void.

1. *What Acts are absolutely void as to all Purposes.*

Bond of a feme covert and infant are void.

Bro. *Obligation*, pl. 26. This, however, with regard to the infant must be understood with some restriction; for if an infant gives a bond without a penalty for necessaries, it is good; and the reason why it is void, if with a penalty, seems to be that the law gives validity to every act of the infant's which may be for his benefit; but it cannot be presumed to be for his benefit to enter into a penalty. Noy, 85, Delaval v. Clare; Cro. Eliz. 920; Ayliff v. Archdale, S. C.; Moor, 697; 1 Inst. 172 a; 1 Roll. Abr. 729; 1 Lev. 87, Russell v. Lee; ‖Fisher v. Mowbray, 8 East, 330; Baylis v. Dineley, 3 Maule & S. 477; Ingledew v. Douglas, 2 Stark. Ca. 36; and where a *feme covert* having a separate estate, gave a bond for a sum advanced at her request to her son-in-law, it was held, that a promise by her to pay it after her husband's decease, was binding on her executors. Lee v. Muggeridge, 5 Taunt. 36.‖ [A warrant of attorney given by an infant is merely void. Saunderson v. Marr, 1 H. Black. 75.] ‖And see Storton v. Tomlins, 2 Bing. R. 475. The trading contract of an infant is not void, but he may enforce it at his election. Bruce v. Warwick, 6 Taunt. 118. And an infant's promise as one of two acceptors of a bill of exchange seems only voidable, not void. Gibbs v. Merrill, 3 Taunt. 307; *sed* vide *contrà*, 2 Barn. & C. 826.‖

‖The probate of the will of a feme covert is absolutely void.

Clayton v. Adams, 6 Term R. 605.‖

So likewise the bond of a person *non compos mentis*, after office found, is absolutely void.

4 Co. R. 128, Beverley's case. It is said the reason why the bond of an infant or person *non compos*, is void, is because the law has appointed no act to be done to avoid it; and the only reason why the party cannot plead *non est factum* is, that the cause of nullity is extrinsic, and does not appear on the face of the deed. 2 Salk. 675, Thompson v. Leach. And see *post*, What acts are voidable only.

And in general all bonds which are given for a purpose *malum in se*, as to kill or rob another, are void.

See *antè*, tit. *Obligation* (D) and (E). β See Badger v. Williams, 1 Chip. 137; Whitaker v. Cone, 2 Johns. Cas. 58; Swett v. Poor, 11 Mass. 549; Toler v. Armstrong, 4 Wash. C. C. R. 297; Jones v. Caswell, 3 Johns. Cas. 29; Thompson v. Davies, 13 Johns. 112; Gulick v. Ward, 5 Halst. 87; Hudson v. Wilkins, 4 Mass. 370; Churchill v. Perkins, 5 Mass. 541; Denny v. Lincoln, 5 Mass. 385; Belding v. Pitkin, 2 Caines, 147.

A contract to do an illegal or immoral act is void.

Forsythe v. State, 6 Ham. 21; Winnebinner v. Weisiger, 3 Monr. 35.γ

Likewise bonds given for the performance of a *malum prohibitum*, as for *maintenance*.

And bonds to oblige persons to neglect their duty to the king and kingdom, are absolutely void.

If a future lease be made to commence after the death of tenant in tail, it is merely void in its creation; for it is not to commence till the title of the issue commences, and that is an elder title concurring with it; and if the law should make it otherwise than void, the law would make him a trespasser.

2 Salk. 620, Machil v. Clerk. See *post*, (C).

If a bishop grants administration, and there are *bona notabilia*, such administration is absolutely void, as well as to the goods within his own diocese as elsewhere, because he hath in such case no jurisdiction whatever.

5 Rep. 30, Prince's case; 8 Rep. 135, Sir John Nedham's case; Noy, 96, Crossman v. Hume. {See 2 Mass. T. Rep. 120, Wales v. Willard.} And see *post*, (C). ‖As to the other cases in which administration is void, and in which voidable, see Toller, Law of Ex. 120, (5th edit.;) *antè*, tit. *Executors and Administrators*.‖

So likewise a judgment, given by persons who have no good commission for that purpose, is void.

3 Inst. 231. And it may be added, that in general all acts done by ministers of justice without authority are void. 10 Rep. 76 b. And see *post*, (C).

‖By 4 G. 4, c. 76, § 22, marriages in any other place than a church or public chapel, &c., unless by special license, or without publication of banns, or license of marriage, or solemnized by a person not being in holy orders, are null and void to all intents and purposes.

4 G. 4, c. 76, § 22; and see tit. *Marriage*, (C).‖

β Commissioners were bound by law to build a courthouse, certain persons agreed by subscription to pay the commissioners a certain sum, provided they would build on a certain lot; this contract is not binding, although they build on the lot, it being contrary to public policy.

County Commissioners v. Jones, 1 Breese, 103; see State v. Collins, 6 Hamm. 142.

Where any part of the consideration of a contract is the suppression of evidence in a criminal prosecution, such contract is void.

Badger v. Williams, 1 Chip. 137.

A contract made to indemnify a party for doing an illegal or immoral act, to be done at a future period, is void.

Kneeland v. Rogers, 2 Hall, 579; 14 Johns. 381; 1 Caines, 450; see Gulick v. Ward, 5 Halst. 87.

An agreement to give B $1000 on condition that he will not offer to the postmaster-general to carry the mail, on a mail route, is void.

Gulick v. Ward, 5 Halst. 87.

An agreement tending to prevent a competition at a sale on execution, is void.

Jones v. Caswell, 3 Johns. Cas. 29; Thompson v. Davies, 13 Johns. 112; 6 Johns. 194; 8 Johns. 444.

An agreement to reprint a literary work, in violation of the proprietor's copyright, is void.

Nichols v. Ruggles, 3 Day, 145.

An agreement made between a third person and an officer to indemnify the latter for neglecting his duty, is void.

Hudson v. Williams, 7 Greenl. 113; Ayer v. Hutching, 4 Mass. 370; 5 Mass. 541. See Denny v. Lincoln, 5 Mass. 385.

An agreement in restraint of trade generally throughout the state, is void.

Nobles v. Bates, 7 Cowen, 307.

But when the party is restrained from trading only in a particular place, or for a particular time, the contract is not void for this cause.

7 Cowen, 307. See 8 Mass. 223; 9 Mass. 522; 1 Pick. 450; 3 Pick. 188; 4 Bibb, 486.

An action cannot be maintained for the price of lottery tickets not authorized by law.

6 Binn. 329; Seidenbender v. Charles, 4 S. & R. 151. See Barton v. Hughes, 2 P. A. Browne, 48; Biddis v. James, 6 Binn. 312; Yohe v. Robertson, 2 Whart. 155; Hunt v. Knickerbacker, 5 Johns. 327.

An obligation for the sale of an office, or a deputation, is void.

Daton v. Rodes, 3 Marsh. 433; Harolson v. Dickens, 2 Car. Law Repos. 66. See Meredith v. Ladd, 2 N. H. Rep. 517; Cardigan v. Page, 6 N. H. Rep. 183; De Forrest v. Brainerd, 2 Day, 528; Tappan v. Brown, 9 Wend. 175.

(B) What Acts are absolutely void.

An agreement in direct opposition to the laws of the place where it is made, is void.

Hall v. Mullen, 5 Har. & Johns. 193. See Wheeler v. Russell, 17 Mass. 258; Farrar v. Barton, 5 Mass. 395; Roby v. West, 4 N. H. Rep. 285.

When a part of the consideration of an entire contract is against law, the whole contract is void.

Carlton v. Whitcher, 5 N. H. Rep. 196; Hind v. Chamberlin, 6 N. H. Rep. 225; Loomis v. Newhall, 15 Pick. 159.

By article of agreement under seal, it was agreed that the defendant should become assistant to the plaintiffs in their business of surgeon-dentists for four years; that the plaintiffs should instruct him in the business of a surgeon-dentist, and that after the expiration of the term, the defendant should not carry on that business in London, or in any of the towns or places in England or Scotland, where the plaintiffs might have been practising before the expiration of the said service. The declaration alleged as breaches, 1st, that after the term, the defendant carried on the said business in London; 2dly, that the plaintiffs had, during the said term, carried on the said business in Great Russell street, Bloomsbury; yet the defendant, after the term, carried on the said business in the same place. Plea, to first breach, that London was a large and populous district, containing 1,500,000 inhabitants, and that the stipulation in the agreement was an undue, unreasonable, and unlawful restriction of trade. Plea, to the second breach, that before the expiration of the service, the plaintiffs had practised in very many towns in England, and amongst others, London, Preston, Oswestry, &c., and that divers of the said towns were distant from each other 150 miles; wherefore the said stipulation was an unreasonable restriction of trade, and the said agreement, as to so much, was wholly void. Held, that the first plea was bad, as the covenant not to practise in London was valid, the limit of London not being too large for the profession in question, and that the latter part of it was also bad, for attempting to put in issue matter of law, viz., the reasonableness of the restriction. *Semble*, that in considering the question of restriction, the populousness of particular districts ought not to be taken into consideration. Held, secondly, that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service, was an unreasonable restriction, and therefore illegal and void; but that the stipulation as to not practising in London, was not affected by the illegality of the other part. Every restraint of trade which is larger than what is required for the necessary protection of the party with whom the contract is made, is unreasonable and void, as injurious to the interests of the public, on the ground of public policy.

Mallan v. May, 11 M. & W. 653.*g*

2. *What Acts are void as to some Purposes only.*

Void things are good to some purposes.

As, if lessee for twenty years take a lease for ten years, to begin presently, upon condition that if a certain thing be not done the lease shall be void; in that case, though the second lease be void on the breach of the condition, yet the surrender remains good.

Finch's Law, 62.

So likewise if a feoffment be made, to be void on the non-performance of a certain condition, yet, after the feoffor's entry for the condition

broken, the feoffee shall have an action for a trespass done by the feoffor before.

Finch's Law, 62.

Also, if tenant at will grants over his estate, though the grant be void, yet it determines his will.

Arg. Hard. 47, Jones v. Clerk. But if an act be made void by a statute, it shall avail to no purpose whatever: therefore a simoniacal presentation does not so much as amount to a claim. Arg. Ibid. [A bill of exchange, or promissory note for money lost at play, is void in the hands of an endorsee, though without notice, and for a valuable consideration. 1 Salk. 344; 2 Burr. 1077.] ‖See 4 Taunt. 683; 4 Barn. & Ald. 212.‖ [The like law, where it is given on an usurious contract. Dougl. 736.] ‖But not in case of usury, if it is in the hands of a *bonâ fide* holder for value. St. 58 G. 3, c. 93. Where a statute expressly declares bills, &c., given on a certain consideration, void to all purposes, there they are void even in the hands of a *bonâ fide* holder for value, as under the gaming act, 9 Ann. c. 14, § 1, the 45 G. 3, c. 72, § 16, 17, respecting the illegal ransom of vessels, &c.; Bowyer v. Bampton, Stra. 1155; Chitt. on Bills, 81; Webb v. Brooke, 3 Taunt. 6; Jackson v. Warwick, 7 Term R. 121. But unless the instrument is declared void, the mere illegality of the consideration is no defence against a *bonâ fide* holder for value. Wyatt v. Bulmer, 2 Espin. R. 538; Chitt. on Bills, 81; unless it is taken after due, Brown v. Turner, 7 Term R. 630.‖ [A lease of a rectory by a rector is void by his non-residence for eighty days, 2 Term R. 749. An annuity deed not enrolled pursuant to the directions of the 17 G. 3, c. 26, is absolutely void. Ibid. 603.]

3. *What Acts are void as to some Persons only.*

A *fraudulent gift* of goods is not void against all, for it remains good against the donor, and is only void against his creditors.

Per Anderson, Cro. Eliz. 445, Upton v. Basset.

So likewise, a feoffment upon maintenance or champerty is not void against the feoffor, but against him that hath right: *per* Beamond, J.

Cro. Eliz. 445, Upton v. Basset.

Also, where a feme covert or infant are bound in an obligation with others, though the bond is void as to the feme covert or infant, yet it is good as to the others, who shall be sued alone, and the writ shall not abate.

Bro. *Obligation*, pl. 26; 1 Roll. R. 41, Winscombe v. Pigott. And see there whether it is necessary to aver the declaration, that the other is a feme covert or infant.

‖By 5 & 6. E. 6, c. 16, all bargains, sales, promises, bonds, &c., for sale of any offices or deputations of any offices shall be void to and against them by whom such bargains, sales, &c., are made.

5 & 6 Ed. 6, c. 16; and see 49 G. 3, c. 126, and tit. *Offices and Officers*, Vol. vii.‖

β Imbecility of mind, not amounting to lunacy, or idiocy, in the grantor of land, is not sufficient to avoid his deed, when there has been no fraud in obtaining it.

Odell v. Buck, 21 Wend. 142. See Desilver's estate, 5 Rawle, 111.

All contracts made by lunatics after inquisition found, are absolutely void.

L'Amoureux v. Crosby, 2 Paige, 422. See as to efficacy of contracts of lunatics, *antè*, *Idiots and Lunatics*, (F).β

4. *How Acts void by Operation of Law may be made good by subsequent Matter.*

In equity the consent of the heir makes good a void devise.

Chan. Cases, 209, Lord Cornbury v. Middleton.

So likewise, a devise void by misnomer of the corporation was decreed to be a good appointment of a charitable use, within the 43 Eliz.

Chan. Cases, 267, Anon.

(C) What Acts are voidable only.

If a lease be made by the husband, of the wife's land, and the husband die, the lease is not void, but voidable, by the wife's entry.

Arg. 3 Bulst. 272, cites Plow. Com. 65, Browning v. Beeston. [Though a lease by the husband of a feme covert's estate (even not within 32 H. 8, c. 28,) is only *voidable*, yet a mortgage of a feme covert's estate, though in form of a lease, is void, Dougl. 53, 54.] ‖See 7 Term R. 478.‖

Likewise, if tenant in tail make a future lease for years, which by possibility may be to commence during the life of tenant in tail, it is not void, but voidable as to the issue.

2 Salk. 620, Machil v. Clark. See *antè*.

So, if an infant make a feoffment or a lease, and deliver it with his hand, it is voidable only.(*a*)

2 Brownl. 248, Plomer v. Hockhead. It is there added, that if the feoffment or lease be executed by letter of attorney, it is a disseisin to him. It has been said likewise, that if the infant reserve a small rent, as one penny, where the land is worth 100*l. per ann.*, such lease is void. 2 Leo. 216, Humfreston's case. ‖(*a*) *Qu.* What is a reasonable time for the infant to avoid the lease after he attains twenty-one? Holmes v. Blogg, 1 Moo. 466.‖

It is said likewise, that a deed of exchange entered into by an infant, or one *non sanæ memoriæ*, is not void, but may be avoided by the infant when arrived at age, or by the heir of him who is *non sanæ memoriæ*.

Perk. 281.

Also, an infant's bond of submission to an arbitration seems only voidable.

Noy, 93, Stone v. Knight.

An infant's contract of marriage likewise is only voidable.

2 Stra. 938, Holt v. Ward, Clarencieux. ‖And so also an infant's trading contract. Bruce v. Warwick, 6 Taunt. 118; *sed* vide *contrà*, 2 Barn. & C. 826.‖

β All contracts made by infants contrary to their interest are void, and all contracts made with semblance of advantage are voidable.

Rogers v. Hurd, 4 Day, 57. See 4 Conn. 376.

A feoffment by an infant is voidable, and all other conveyances made by him *in pais*, are voidable at his election.

Dearbon v. Eastman, 4 N. H. Cas. 441; 6 Conn. 494; 17 Wend. 119; 6 Paige, 635; 2 Tenn. 431.*g*

So likewise the deed of a person *non compos mentis*, before office found, is voidable only, but cannot be avoided by the party himself.

4 Rep. 124, Beverley's case. The reason why their acts cannot be avoided by themselves, is because it is a maxim in law, that no man of full age shall be admitted to stultify himself. Id. Ibid., and see *antè*, (B). ‖See Baxter v. Earl of Portsmouth, 5 Barn. & C. 170.‖

β A contract made with a man who is intoxicated, so as not to know what he is doing, is voidable.

Barrett v. Buxton, 2 Aik. 167. See 2 Verm. 97; 2 Rep. Const. Court, 27; 1 South, 361; 1 Green, 231; 1 Bibb, 168.*g*

A presentation, institution, and induction of a layman is not void, but only voidable by sentence.

Per Popham, Cro. Eliz. 315, Pratt v. Stocke.

Likewise, if the archbishop of a province grant administration, where there are not *bonâ notabilia* to warrant a prerogative administration, yet

(D) How voidable Acts may be made good.

such administration is only voidable; because the archbishop hath a general jurisdiction over all the dioceses in the province.

Cro. Eliz. 457, Bingham v. Smeathwick. See *antè*, (B), note the difference. ‖See Toller's Law of Ex. 120, (5th edit.)‖

So also, if letters of administration be granted to one, and after granted to another, by this the first are not avoided, except by judicial sentence.

Cro. Eliz. 315, Pratt v. Stocke.

‖ It is no objection to an action on a promissory note that it was given as part of the consideration of an indenture of apprenticeship for less than seven years, by being antedated, such indenture being by the statute of Elizabeth, only voidable and not void.

Grant v. Welshman, 16 East, 207.‖

An order of the justices likewise, being a judicial act, is not absolutely void, but voidable only, and continues to be an order till it is avoided.

2 Salk. 674, Hall v. Biggs.

So likewise, the judgment of a superior court is not void, but only voidable by plea or error.

2 Salk. 674, Prigg v. Adams; S. C., Carth. 274.

Thus, an erroneous attainder is not void, but voidable by writ of error.

2 Inst. 184; 2 R. 3, fo. 21, 22.

Though the statute of Westm. 2, 13 Ed. 1, c. 1, says *finis ipso jure sit nullus*, yet it is not void against the party, or his issue, or him in reversion; but the issue and he in reversion have remedy to avoid it; and the words of the statute *sit nullus* are construed to mean that it *is as good as void*, in respect of the defeasibleness of it.

Arg. 1 Roll. R. 158, 159, Warren v. Smith, *alias* Magdalen College's case.

So, where the statute of additions ordains, that if any be outlawed without addition, the outlawry shall be clearly void and of no effect, yet it shall not be void without writ of error.

Arg. Roll. R. 159, Smith v. Warren.

β A contract made while the defendant was under duress, may be avoided. But an agreement made by a party under *legal* arrest is not void on that ground.

Shephard v. Watrous, 3 Caines, 166.

In South Carolina, duress of *goods* has been holden sufficient to enable the defendant to avoid a contract.

Collins v. Westbury, 2 Bay, 211; Sasportas v. Jennings, 1 Bay, 470; but see 2 Gallis. 337; Hardin, 605.β

(D) How voidable Acts may be made good.

WHERE a lease is voidable, acceptance of the rent will make it good; but, where it is void, no acceptance or other act can make it good.

3 Rep. 64 b. ‖Co. Litt. 215 a, n. 1.‖ Thus in the case above put, where tenant in tail makes a future lease, which may possibly commence in his own life, though it is voidable as to the issue, yet it may be made good by the issue's acceptance of rent. *Arg.* 3 Lev. 271, Butler v. Baker. ‖As to voidable leases, see tit. *Leases*, (D) and (I), *antè*, vol. v.‖

β A voidable contract of an infant may be ratified, either expressly or impliedly by his acts.

Lawson v. Lovejoy, 8 Greenl. 405; Cheshire v. Barrett, 4 M'Cord, 241. See *antè*, vol. v. 143.

(E) How they may be avoided.

An infant cannot confirm his contract for part and avoid it for the remainder.

Bigelow v. Kinney, 3 Verm. 353; Dana v. Coombs, 6 Greenl. 89.

(E) How they may be avoided.

A DEED being voidable, is to be avoided by special pleading; and where an act of parliament says, that a deed, &c., shall be void, it is intended that it shall be by pleading.

5 Rep. 119 a, Whelpdale's case.

Where a deed is a voidable deed at the time of pleading; as, if an infant seal and deliver a deed, or one of full age deliver a deed by duress, &c., the obligor must not plead *non est factum;* because when the action was brought it was his deed, and must be avoided by special pleading.(*a*)

5 Rep. 119 a, Whelpdale's case. But if the seal be broken, defendant may plead *non est factum;* for though it was once a deed, yet at the time of the plea it was not his deed, Id. ibid. [(*a*) The reason why the defendant in this case must plead specially, and not merely rely on the *plea of non est factum*, is not because the instrument is in *form* a deed, but because it has an operation from the *delivery*. For the delivery of a deed cannot be void, but is only voidable; so that deeds which *take effect by delivery* can be only *voidable;* whilst those which do *not so take effect* are absolutely *void*. 3 Burr. 1804; 1 H. Black. 75. But it is not because the deed may be avoided by special pleading, that it is therefore voidable; but being only voidable, the party is bound to disclose that matter in his plea which shall avoid it; for *primâ facie* it is good; it passeth an interest; it is capable of confirmation; its validity, therefore, shall not be questioned without giving the other party an opportunity of supporting it in his replication.] ‖ Neither the text nor the note afford any clear rule as to the cases where a bond must be avoided by a special plea, and where the matter may be shown on *non est factum*. The distinction seems to be, that matter which tends to show an invalid or *defective execution of the deed* (as an execution by a lunatic, Stra. 1104, a feme covert, or under fraud, or by a drunken man, Com. Dig. *Pleader*, 2, (W), 18; Bull. N. P. 172, or a subsequent erasure, 3 Camp. 181,) may be shown on *non est factum;* but that matter impeaching the deed for the *illegality of its matter or consideration*, whether at common law or by statute, should be specially pleaded, concluding, "and so the said deed is void," and not "*sic non est factum.*" Thus in case of a bond in restraint of matrimony, or given to compound a felony, Colton v. Goodridge, 2 Black. R. 1108; Harmer v. Wright, 2 Stark. Ca. 35; Harmer v. Rowe, 2 Chitt. Rep. 334. So also in cases of usury and gaming, the illegality must be specially pleaded, 1 Stra. 498; Com. Dig. *Pleader*, 2 W. 26; 1 Saund. 295 a, note (1). So, also, that the bond was for securing the price of goods sold by plaintiff to defendant for an illegal traffic to the East Indies. Paxton v. Popham, 9 East, 408; or that the bond was illegal and void by the 49 G. 3, c. 126, against the sale of offices. Greville v. Atkyns, 9 Barn. & C. 462; and see Pole v. Harrobin, 9 East, 416. So, also, according to 2 Will. Saund. 59, n. (3), if a bail-bond is not made according to the stat. 23 Hen. 6, c. 9, a special plea is necessary. But in Thompson v. Rock, 4 Maule & S. 338, it was held that this defence might be made on *non est factum*, on the ground that the plea, if special, would in such case conclude "*et sic non est factum;*" and that, according to modern practice, the plea might therefore be general. But the learned editor of Coke's Reports, part 5, 119 b, shows that the special plea in such case would conclude (according to 1 Lord Raym. 349; 2 Vent. 237; 1 Saund. 159; Bro. Abr. *Non est factum*, 14;) "and so the deed is void and of no effect;" and the case therefore is of doubtful authority. The cases of infancy and duress, in which the defence must be specially pleaded, seem hardly reconcilable with the above distinction, since they impeach the execution of the deed, and do not show illegality in the matter or consideration; and in these cases, it seems the plea is a special *non est factum*. See 5 Coke's Rep. 119 b, note (c), and the cases there cited. In 1 Will. Saund. 295 a, note, it is said that, though usury appear on the face of the condition, the defendant cannot demur, but it must be specially pleaded. But this seems erroneous, ibid. note (f); and see 2 Term R. 575.‖

But a feoffment or lease for life, which is declared to be void on breach of a condition, must nevertheless be made void by re-entry, it being a free-

(F) By whom they may be avoided.

hold conveyed by livery: whereas a lease for years on breach of the condition is absolutely void, and there needs no re-entry.

3 Rep. 65 a, Pennant's case; Poph. 100, Goodale v. Wyatt.

‖ Assuming that an infant may avoid indentures of apprenticeship by which he has bound himself, (which does not appear quite settled,) still his leaving his master's service and going into that of another person, is not such an act as will avoid the indentures.

The King v. Hindringham, 6 Term R. 557; Ashcroft v. Bertles, Ibid. 652; and see 3 Maule & S. 497.‖

(F) By whom they may be avoided.

Of a void act or deed every stranger may take advantage, but not of a voidable one; as, if there are two joint-tenants within age, and one makes a lease for years, and dies, the other shall avoid it, for the lease is utterly void: but, if the one leases for life, and makes livery in person, and dies, the other shall not avoid it. *Per* Wray, C. J.

2 Lev. 218, in Humpherston's case.

β Privies in blood and representation may avoid the voidable deeds of lunatics, but privies in law and estate cannot.

Brackenridge v. Ormsley, 1 J. J. Marsh. 245. See Cates v. Woodson, 2 Dana, 454; Lazell v. Pinnick, 1 Tyl. 247. See *antè*, *Infancy and Age*, (I), 6.β

‖ Where an infant slave in the West Indies executed an indenture, covenanting to serve B for a certain term of years as his servant, and B covenanted to do certain things on his part, and B then came to England with the slave, and A, a recruiting officer, enticed him to enlist. In an action brought by B against A for seducing his servant from his service the question was, Whether the allegation in the declaration that the infant slave contracted to serve B for a term of years was proved, since the youth was both an infant and a slave, and therefore incapable of binding himself by the indenture. But Heath, J., considered the contract beneficial to the infant, since by analogy to the old law respecting villains, (Co. Litt. 137 b; 11 Sta. Tri. 342,) it might be a manumission by implication;(*a*) and the court accordingly held that the contract was voidable only, and that the defendant, a stranger and wrongdoer, could not take advantage of the infant's privilege of avoiding his contracts, which was personal to himself.

Keane v. Boycott, 2 H. Black. 511. (*a*) The learned Reporter suggests that this analogy is unsound; and that by the general policy and local institutions of the W. I. Islands, a slave cannot be manumitted by *implication;* and cites the law of St. Vincent, prescribing a mode of manumission, with a promise for an annual allowance to the slave, and enacting, that "any manumission in any other manner *shall be void.*" But *quære*, whether this clause can apply to any other than *express* manumissions contrary to the mode prescribed; and, at all events, the master having voluntarily treated his slave as *sui juris*, by contracting with him, would seem to be *estopped* from contending that such contract was *void;* and what the master could not do, surely no stranger could do. And with respect to the infancy, whether the contract would be an implied manumission or not, certainly it is not such a contract as the court could of itself pronounce prejudicial, and therefore *void*. It seems therefore clearly only voidable, and then the right of avoiding it only belongs to the infant. So that the decision seems sound, whether the analogy suggested by Heath, J., be tenable or not.‖

WAGER OF LAW.

WAGER of law is a particular mode of proceeding, whereby, in an action of debt(*a*) brought upon a simple contract between the parties, without deed or record, the defendant(*b*) may discharge himself by swearing in a court in the presence of compurgators,(*c*) that he oweth the plaintiff nothing in matter and form as he hath declared. And this waging his law, is sometimes called *making* his law.

(*a*) Actions of debt are the most common cases in which defendant may wage his law; but he may likewise wage his law in actions of *detinue* and other cases, as also in real actions, as will appear in the course of this title. (*b*) In some cases, however, the *plaintiff* may wage his law. See letter (E). (*c*) According to some, the compurgators should be eleven in number, for which reason every wager of law is said to countervail a jury, as the defendant must wage his law, *de duodecimo manu*, that is, by himself and eleven more. Others hold *twelve* to be necessary; but, according to some, less than eleven will suffice. The defendant is sworn absolutely *de fidelitate*, and the compurgators *de credulitate;* that is, that they believe what he swears to be true. 33 H. 6, f. 8; 1 Inst. 295; 2 Shep. Abr. 190; 2 Vent. 171; Anon. N. B. It has been said, that compurgators are not absolutely necessary, unless the plaintiff demands them. 2 Keb. 360, Puckridge v. Brown.

For the better understanding of this title, which is now in a great measure obsolete,(*d*) it will be necessary to consider the following heads:

(*d*) When a defendant has waged his law, it is a perpetual bar to the plaintiff's demand, for the law presumeth that no man will forswear himself; but men's consciences, as Lord Coke observes, are grown so large, especially in this case which passes with impunity, (since no indictment for perjury lies in wager of law,) that it is now become customary, instead of bringing actions of debt, to bring actions upon the case upon the defendant's promise, wherein he cannot wage his law. 1 Inst. 295; 1 Vent. 296. Actions of *detinue* likewise are now seldom brought, actions of *trover and conversion* having taken place in their stead, where the conversion changes the *detinue to an action on the case.*

(A) The Reason for allowing the Wager of Law.

(B) The Manner of waging Law.

(C) At what Time Law may be waged.

(D) In what Cases Law may be waged, and in what not.

(E) What Persons may wage their Law.

(F) Against whom Wager of Law lies.

(G) In what Cases the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney.

(A) The Reasons for allowing the Wager of Law.

THE reason wherefore, in an action of debt upon a simple contract, the defendant may wage his law, is, for that the defendant *may satisfy the party in secret*, or before witnesses, and all the witnesses may die, so the law doth allow him to wage his law for his discharge. And this is peculiar to the law of England, and no mischief issueth hereupon; for the plaintiff may take a bill or bond for his money; or, if it be a simple contract, he may bring his action upon his case, upon his agreement or pro-

mise, which every contract executory implieth, and then the defendant cannot wage his law.

2 Inst. 45. β If the wager of law ever existed in the United States, it is now abolished. The general rule is that an action of debt will lie against executors; to this there is an exception that it will not lie where the executor might have waged his law. When this objection exists, however, the executor may waive the benefit of it; and if he omit to demur, but pleads to the action, and a verdict is found against him; he cannot take advantage of it, on this account, either in arrest of judgment, or by writ of error. Childress v. Emory, 8 Wheat. 642.γ

It hath been said, however, that the *only true reason of* wager of law is, the *inconsiderableness of the ground of the plaintiff's demand*, and it suffices that the nature of the defendant's discharge be of equal validity with the ground of the plaintiff's charge. *Per* Hatsell, J.

12 Mod. 670, The City of London v. Wood. It is an argument, says Hatsel, J., that the matter is of no great value, that the plaintiff did not take care to have better security for it than the slippery memory of man, and the uncertainty of a verbal contract; so that since the tie was so slight, it is no wonder if the law will slightly discharge it.

Originally it was *not only a privilege of the defendant* to discharge himself, but one which the *plaintiff* had, when he had no witness of his debt, to put the defendant under a necessity of giving him his oath to discharge himself: so it was a kind of equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confess the debt, rather than the plaintiff should lose his debt, in cases where he had no witnesses of it at all, or had some who were then dead. *Per* Holt, C. J.

12 Mod. 678, The City of London v. Wood.

The plaintiff's bare affirmance was formerly sufficient to put the defendant to wage his law; but it is provided by *Magna Charta*, that "No bailiff shall put any man to his law, nor to an oath, upon bare saying, without witnesses brought in." Before this, as has been premised, the plaintiff, on his declaration on bare affirmance, might make the defendant swear there was nothing due. At this day, if the plaintiff produce witnesses to prove his demand, the court may put the defendant to wage his law; and in such case the defendant is not at liberty to cross-examine, any more than where the plaintiff in a prohibition produces witnesses to prove his suggestion.

2 Salk. 683, Mood v. The Mayor of London.

(B) The Manner of waging Law.

The manner of *waging of law* is thus: he that is to do it must bring six compurgators with him into court, and stand at the end of the bar towards the right hand of the Chief Justice; and the secondary asks him, Whether he will *wage his law?* If he answers that he will, he lays his right hand on the book, then the judges admonish him and his compurgators to be advised, and tell them the danger of taking a false oath; and if they still persist, the secondary says, and he that *wageth his law* repeats after him: *Hear this, ye justices, that I, A B, do not owe to C D the sum of, &c., nor any penny thereof in manner and form as the said C D hath declared against me: so help me God.* The compurgators then severally make oath, that they believe he swears truly. But, before the defendant takes the oath, the plaintiff is called by the crier thrice; and if he do not appear he becomes nonsuited, and then the defendant goes quit without

(C) At what Time Law may be waged.

taking his oath; and if he appear, and the defendant swear that he owes the plaintiff nothing, and the compurgators give it upon oath, that they believe he swears true, the plaintiff is barred for ever; for when a person has *waged his law*, it is as much as if a verdict had passed against the plaintiff; if the plaintiff do not appear to hear the defendant perform his law, so that he is nonsuit, he is not barred, but may bring a new action.

2 Lill. Abr. 824; 2 Vent. 171, Anon.; 2 Salk. 682, Anon. ‖ But it appeared in a late case to be doubtful how many compurgators were proper, and the court refused to assist the defendant by assigning the number. King v. Williams, 2 Barn. & C. 538.‖

(C) At what Time Law may be waged.

DAY *given* for waging law is peremptory. *Per* three justices against one.

3 Bulst. 316. And the defendant cannot afterwards waive it without the plaintiff's consent, and betake himself to the country, and upon his non-appearance a *deficit de lege* was entered. Bulst. 186, Harrison v. James.———But there is a case where, after the roll was marked with a *deficit de lege, and costs assessed*, it was moved and prayed, *sedente curia*, that the defendant might be demanded again, and it was granted, and then defendant made his law. Noy, 42, Anon.

Where the defendant wages his law *instantèr*, that is, the same term without day given over, the plaintiff need not be called; consequently, cannot be nonsuited. Thus—

In debt by assignees of commissioners of bankrupts, defendant came in and *waged his law instantèr*, and it was debated if the plaintiff might be nonsuited; and at length it was agreed, inasmuch as the defendant came *instantèr*, that the plaintiff cannot be *nonsuited;* for which reason the *plaintiff was not called*, but the defendant waged his law: and so the plaintiff was barred.

Sid. 366, Buckeridge v. Brown. The reporter says, vide that when defendant comes *instanter* to wage his law, or at another day in the same term, to which the plaintiff has imparled, the plaintiff shall not be demanded, nor can he be nonsuited. Ibid. cites 14 H. 4, c. 19 b; 3 H. 6, c. 50 a, S. C.; 2 Keb. 360, by the name of Puckeridge v. Brown.

But in *debt* where the *defendant tendered to make his law immediately that he owed nothing, &c.*, because the plaintiff appeared in court, it was awarded that the plaintiff should make his law; and this was the folly of the plaintiff, for *he might have imparled to the law, and then at the day he might have been nonsuited.* But Brooke makes a *quære*, if he may be nonsuited at another day in the same term.

Bro. *Ley Gager*, pl. 85, cites 3 H. 4, c. 2; Brooke, tit. *Nonsuit*, pl. 10, S. C. says, that if he had imparled to the law, such imparlance ought to be another term.

So in debt, the defendant tendered his law, and the *plaintiff imparled to a day in the same term;* there the *plaintiff shall not be demanded, nor be nonsuited;* for his appearance was of record the same term, and if he refuses the law, he shall be barred.

Bro. *Ley Gager*, pl. 96, cities 3 H. 6, c. 49.

It is said that the defendant cannot pray to be admitted to wage law *instantèr*, after imparlance, but before he may, and then the plaintiff cannot be nonsuit, if the defendant perfect his law: but, if he wage his law after imparlance, the plaintiff may be nonsuit.

2 Lill. Abr. 825.

In debt, the defendant waged his law, and when he came to perform it, *the plaintiff said, that he who now came is another of the same name*, for his action is against J S *the elder;* and he who now appears is J S

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the younger, and prayed his judgment. *Quære*, for the averment was not granted or denied.

Bro. *Ley Gager*, pl. 91, cites 5 E. 4, c. 5.

In debt, the defendant had *day given* to wage his law, and *at the day defendant was sick of a burning fever*, whereupon the court was moved for another day for the defendant to come and wage his law, and offered to make all this good by an affidavit; but the court refused, and advised him to plead to the country, and so he did.

3 Bulst. 263, Smink v. Barker.

In *debt upon arbitrament* the *defendant imparled*, and *came back the same term and tendered his law;* and *per cur.* he shall have his law.

Bro. *Ley Gager*, pl. 41, cites 8 H. 6, c. 10.

So in *detinue*, the *defendant pleaded in bar, and after relinquished it, and waged his law*, and well; for a man may relinquish his plea, and plead the general issue, and this shall be before the plea entered.

Bro. *Pleadings*, pl. 119, cites 2 E. 4, c. 13.

In a *præcipe quod reddat*, the tenant came *at the grand cape* and waged his law of *non-summons*, and at the day, &c., came to make his law, and the *demandant offered to waive the default, and prayed that the tenant may plead in chief. Per* Finch, you cannot do so unless the *tenant* will consent to it; and the *tenant* was thereof demanded, and *would not consent*, therefore he waged his law, and the demandant took nothing by his writ: but *at the first day when the tenant offered his law, the demandant might have released the default*, as it seems.

Bro. *Ley Gager*, pl. 82, cites 42 E. 3, c. 7.

In a *præcipe quod reddat*, where *essoign is cast for the tenant at the summons returned, and* by his default *grand cape issued;* there he cannot wage his law of non-summons at the day, unless he *surmises that the essoign was not cast by him.*

Bro. *Ley Gager*, pl. 90, cites 36 H. 6, c. 23; and see 10 H. 6, c. 9, that if he had so surmised, he might wage his law. Ibid.

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Wager of law *is allowable in five cases.* First in *debt* upon *simple contract*, which is the common case. Secondly, in *debt upon an award* upon a *parol submission.* Thirdly, in *an account against a receiver* for receipts by his own hands. Fourthly, in *detinue*, though the bailment were by the hands of another. Fifthly, in *an amerciament in a court-baron* or other inferior courts not of record; and in every of these instances, the action is grounded on a feeble foundation, and of small consideration in law. *Per* Hatsell, J.

12 Mod. 670, The City of London v. Wood.

It is to be observed likewise, that there is a wager of law of non-summons in actions real, as, where upon summons against a tenant, he wages his law, saying, that he was not summoned according to the law of the land.

Note.—This summons must be on the tenant's land, and if against an heir, must be on the lands which did descend; or on default, the tenant at the grand cape may wage his law of non-summons.

Thus, if summons in *præcipe quod reddat* be served fifteen days before the

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first day of the return of the writ, the tenant may wage his law of non-summons: for fifteen days before the fourth day of the return will not serve.

Bro. *Ley Gager*, pl. 57, cites 24 E. 3, c. 46.

So it is said in writ of *desceit*, that if the sheriff returns *in præcipe quod reddat, that the tenant is summoned by J N and J C, where he was not summoned but by one of them*, the tenant may wage his law, *that he was not summoned according to the law of the land.* *Per* Fulthorp.

Bro. *Ley Gager*, pl. 27, cites 50 E. 3, c. 16. *And per* Belk, the vouchee in *præcipe quod reddat* shall not wage his law, *that he was summoned upon the summons;* for he need not save his default at the *grand cape ad valentiam; but if he be returned summoned, where he was not summoned, and after grand cape ad valentiam* issues, he shall have *desceit* of the return, &c. Ibid.

But in 33 H. 6, c. 8, in a *præcipe quod reddat*, the *tenant made default*, but appeared on the return of the grand *capias*, and *pleaded non-summons*, and would conclude to the country, where the proper trial was by wager of law of non-summons; and the question there was, if he could waive his plea of wager of law, and betake himself to a plea concluding to the country? And the better opinion there is, that he could not put himself upon his country, and decline this wager of law; and that case is plainly out of the statute of *Magna Charta*, because it is not debt, nor *simplex loquela*, but a process of non-summons, from which he was to save himself. *Per* Holt, C. J.

12 Mod. 679, The City of London v. Wood.

It has been said, that a man may wage his law of *non-summons in re-summons*, as well as he may in the original; *per* Brian and Choke, but *per* Catesby, *contrà*. *Quære;* and the writ was returnable 15 Trin. and the *summoners summoned him about the 15th of Corpus Christi;* and therefore, *per* Choke, he may wage his law of non-summons, that he was not summoned according to the law of the land; for the law is, that he *shall be re-summoned by the day in the writ;* but Catesby said, that he cannot wage his law here by conscience, nor can he wage his law in re-summons.

Bro. *Ley Gager*, pl. 103, cites 1 E. 5, c. 2.

Where things are part real and part personal, the defendant may wage his law sometimes for the whole, and sometimes for part only, thus—

In *detinue of a box with charters* and muniments, if the plaintiff *counts not of any charters in particular*, the defendant may wage his law of the whole, 19 H. 6, 9; because before the showing of it, the box and all in it was but a chattel.

2 Roll. Abr. 108.

If detinue be brought *for a chest sealed, with money and charters of land in it*, the law lies of the whole.

2 Roll. Abr. 108.

But otherwise it is, if he *declares of certain charters in particular*, and if the *writ be not that the chest was sealed.*

2 Roll. Abr. 108.

In detinue of certain charters and muniments contained in a chest, if plaintiff declares of one charter in particular, the defendant may wage his law of the residue.

2 Roll. Abr. 108. In such case the defendant waged his law as to all but this particular charter, and did it immediately; and the reason seems to be, that when it is in a chest enclosed, the charters are of the nature of the chest, which is only a chattel: *contra* of charter special; for of this he cannot wage his law, because it *concerns frank-tenement.* Bro. *Ley Gager*, pl. 61, cites 14 H. 6, c. 1.

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But in *no case where a contempt, trespass, deceit, or injury is supposed in the defendant*, shall he wage his law; because the law will not trust him with an oath to discharge himself in those cases.

1 Inst. 295 a.

Likewise where the *matters charged are facts notoriously known*, in such case there are no precedents of wagers of law. *Per* Hatsell, J.

12 Mod. 671, Civit. London v. Wood; and *per* Holt, C. J. The *secrecy of the contract*, which raises the debt, is the reason of the wager of law. *But*, if the debt *arise from a contract* that is *notorious*, there shall be no wager of law. In debt upon a *contract for a sum in gross*, wager of law will lie; *but*, if debt be brought *for rent* due *upon a parol lease*, it will not lie; and the reason is, because it is in the realty, and arises from the taking of the profits of the land, and occupation of it in the country, and so the notoriety of the thing excludes the defendant from waging his law. Ibid. 681.

Agreeable hereto it was said by Holt, C. J., that in account, if the receipt was by the defendant, the defendant may wage his law, but not if by the hands of a third person:(*a*) it is true, the law is otherwise in detinue on a bailment; for though the bailment was by the hands of a third person, the defendant may wage his law; but here the bailment is not traversable, but the detainer, and that is the point of the action, and the delivery might be private.

2 Salk. 683, Mood v. The Mayor of London. (*a*) Because the receipt is traversable in this action; 2 Roll. Abr. 109; and *because it appears*, from the nature of the action, *that a third person can prove the receipt per* Holt, C. J., 12 Mod. 679; but in account *by the baron of receipt by the defendant, by the hands of the feme of the plaintiff*, the defendant may wage his law; for the baron and feme are one person in law; and, therefore, it is an immediate receipt of the plaintiff himself. Bro. *Ley Gager*, pl. 54.

By the 4 and 5 Annæ 16, it is enacted, that actions of *account* may be brought *against a bailiff or receiver* for receiving more than his just share, and an action of *account was brought* upon this statute *against defendant, as bailiff ad merchandizandum*, who waged his law; and upon demurrer, it was objected that wager of law would not lie against a bailiff *ad merchandizandum; but if* the action had been brought *against a receiver* and *plaintiff did not show by whose hands*, there, wager of law would lie; and so it was adjudged in this case for the plaintiff.

8 Mod. 303, Page v. Barns.

There is no act of parliament in express words which takes away wager of law in action of debt upon arrearages of account; but at the common law the defendant shall have his law in action of debt, brought upon arrearages of account, whether the account be before one auditor, or many, as appears in 38 H. 6, f. 6 a. But the *reason why the defendant shall not wage his law when the account is made before auditors, is upon the statute of West.* 2, c. 11, for now this statute *has made the auditors judges of record*, because they are empowered thereby to commit the defendant to prison, which none can do but judges of record.

10 Rep. 103 a, in a note of the reporter, in Alfride Denbawd's case.

Also, when the matter of the charge is pregnant with matter of law, there ought to be no wager of law, for that were to swear to the law; as in debt against husband for clothes taken up by the wife, the husband shall not wage his law; because it is a point of law, whether he be liable or no, viz.; whether the clothes were for necessary apparel of the wife, without which he is not liable.

12 Mod. 671, Civit. London v. Wood.

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In debt on an arbitrament (it is intended where the submission is by parol) the defendant may wage his law; because, though the arbitrators, who are strangers, are concerned, yet the submission might be secret; and that is the foundation from whence the debt arises.

2 Salk. 683, Mood v. The Mayor of London.

In debt for an amerciament in a court-baron, the defendant may wage his law. The reason is, because the matter is of small value which concerns the lord only, transacted *in pais* which might be without his knowledge. But in debt on a judgment in a court-baron, the defendant cannot wage his law; for the judgment could not be but by confession or verdict, and it was in a proper court; all which the defendant cannot by his bare oath falsify; and the authorities to the contrary are not law; and so it is in debt on a judgment in a court of ancient demesne.

2 Salk. 683, Mood v. The Mayor of London.

In debt for rent on a lease-parol, the defendant cannot wage his law, because his occupation is notorious, which is a better reason than because it savours of the reality; and so it is in account against a bailiff for the same reason, his management and transaction being notorious.

2 Salk. 683, Mood v. The Mayor of London.

In debt brought by a jailer against his prisoner for meat and drink, the defendant, *per* Holt, cannot wage his law, not because the jailer is obliged to find him victuals; that is not true, as appears by Plowd. 68 a; but because the defendant is in durance, and the plaintiff cannot take security from him for repayment; for a bond will be void, so that he must be content with a promise: and he did not deny the case of 9 Rep. 87 b, 88 a, which was debt by a labourer; it is but just that the plaintiff should prove he was retained, rather than that the defendant should be put to wage his law.(*a*)

2 Salk. 683, Mood v. The Mayor of London. (*a*) The master shall not wage his law, because the labourer is compellable to serve by the statute; but it is otherwise, if he be not retained according to the statute. 1 Inst. 295 a.

But, if a victualler or common innkeeper bringeth an action for his guest's victuals delivered to him, the guest may wage his law; for a victualler or innkeeper is not compellable to deliver victuals till he be paid for them in hand: and therewith agreeth 10 H. 7, c. 8 a.

9 Rep. 87 b, Pinchon's case.

In debt on a by-law made by the company, the defendant in a case cited to be in B. R. about two years before, waged his law. But Holt, C. J., said it was, because the counsel for the plaintiff did not challenge it: for he wondered at it then. But this is not so strong as debt on a by-law by a corporation; for this obliges all strangers without notice; but the other only their own members, till notice: And the Chief Justice denied the case in Co. Ent. 118, and the case 2 Roll. Abr. 106, pl. 9.

2 Salk. 684, Mood v. The Mayor of London.

Wager of law lies not *in quo minus*, because the *king's revenue* is remotely concerned, upon suggestion, that the plaintiff is indebted to the king, and less able to pay him by the defendant's detainer of his debt. *Per* Hatsell, J., who said this was given as a reason in Slade's case.

4 Rep. 95 b, in Slade's case; 12 Mod. 671, The City of London v. Wood.

In debt upon a penalty given by statute, the defendant shall not wage his law.

1 Inst. 295 a.

(E) What Persons may wage Law, and what not.

The very *custom of London* excludes wager of law in some actions, as in *debt for diet*, 1 E. 4, c. 6, Bro. *Examination*, 18, the statute of 38 E. 3, c. 5, before which no wager of law could be against a Londoner. *Per* Hatsell, J.

12 Mod. 671, cites Bro. *Ley Gager*, 94.

So, a *prescription* prevents wager of law, and no man can deny it upon oath. *Per* Holt, C. J.

12 Mod. 683, The City of London v. Wood.

Wager of law was denied in *debt for scavage* arising by *prescription*, and that confirmed by act of parliament.

2 Vent. 261, Mayor, &c. of London v. Dupester; 2 Lev. 106, S. C. by name of Mayor, &c. of London v. Deputee.

In debt for a *duty* growing by a by-law, if the *by-law be authorized by letters patent*, no wager of law lies.

Vent. 261, The Mayor, &c. of London v. Dupester.

So in case for *toll* granted by letters patent.

Vent. 261, cites 20 H. 7. In action of debt for toll by *prescription*, you cannot wage your law: *per* Hale, C. J., who asked if they could show a precedent where a man can wage his law in an action brought upon a prescription for a duty. 1 Mod. 121, pl. 26, Draper v. Bridewell.

Where a person of quality intending a marriage with a lady, presented her with a jewel, and the marriage not taking effect, he brought an action of *detinue* against her, and she taking it to be a gift, offered to wage her law; the court was of opinion, that the property was not changed by this gift, being to a special intent, and therefore would not permit her to do it.

2 Mod. 141, Beaumont v. ———.

‖In an action of account, if plaintiff declares on a receipt by the hands of the defendant, he may wage his law, but if by other hands he shall be ousted of his law.

Walker v. Holiday, Com. R. 272; Wheeler v. Horne, Willes, 208.‖

(E) What Persons may wage Law, and what not.

An alien shall wage his law in that language he can speak.

1 Inst. 295 a.

A man outlawed, or attainted in an attaint, or upon an indictment of conspiracy, or perjury, or otherwise, whereby he becomes infamous, shall not wage his law.

1 Inst. 295 a.

A man under the age of twenty-one years shall not wage his law: but a feme covert, together with her husband, shall wage her law.

1 Inst. 295 a. The reason why an infant cannot wage law, is said to be because he cannot take an oath. 11 H. 6, 40.

Wheresoever a man is charged as executor or administrator, he shall not wage his law, for no man shall wage his law of another man's deeds.

1 Inst. 295 a.

So, where *two* ought to have their law, and *one is under age*, both shall be ousted; because the infant cannot, and both ought to join in plea.

11 H. 6, f. 40, b.

A man who is *dumb and not deaf*, may wage his law of *non-summons*, and make it, and show his assent by signs. Adjudged.

18 E. 3, f. 53.

(F) Against whom Wager of Law lies.

In an *account*, if the defendant before *auditors pleads payment, or other things given in satisfaction*, the *plaintiff may wage his law* of it, though he be plaintiff.

30 E. 3, f. 4, b.

Tenant who is summoned by one summoner where there ought to be two, may wage his law, of non-summons, according to the law of the land; but *vouchee shall not wage his law of non-summons* upon the writ of summons.

Bro. *Disceit*, pl. 11, cites 50 E. 3, c. 16.

In *formedon against a feme* who made default, and *grand cape* issued returnable 15 Mich., before which day *she took baron*, and at the day appeared and waged her law of *non-summons;* and the feme made her *law alone without her baron*, and the writ abated.

Bro. *Ley Gager*, pl. 32, cites 12 H. 4, c. 24.

He who is *attainted of any falsity*, or is *perjured*, shall not wage his law.

Bro. *Ley Gager*, pl. 81, cites 33 H. 6, c. 32, *per* Litt.

In *account* the *defendant* upon his account *alleged tallies of the plaintiff, by which he had received certain sums of the money*, and the *plaintiff waged his law, that they were not his tallies;* and it was admitted; and so see that the *plaintiff* may wage his law, and by it shall charge the defendant.

Bro. *Ley Gager*, pl. 40, cites 21 E. 4, c. 49.

A *bailiff* may not wage his law, but a *receiver* may.

Cro. Eliz. 790, Shyfield v. Barnfield. *Per* Holt, C. J. The reason the book gives is, because it is in the realty, which is as much as to say, because it is notorious to the country; because the country take notice of his looking after the manor, and have thereby an opportunity of knowing that he received the rents. 12 Mod. 681.

A brought *debt upon a joint contract against B, C, D, and E—E was outlawed, B, C, and D appeared by a joint supersedeas. B tendered his law*, that he, with the rest did not owe. *C and D plead nil debent per patriam.* It was insisted, that B should not be admitted to his law alone, because they were all charged as one defendant, being for a joint debt, and so they must all answer together. But this was held to be unreasonable; for if so, then by joining others with me, as joint defendants, I must be subject to their plea, though they would confess the action; and though defendants may not sever in dilatories, yet in bar they may: And after divers motions and precedents produced, B was received to his law, and the plaintiff nonsuited.

Hob. 244, Essington v. Bourcher.

(F) Against whom Wager of Law lies.

In an *action brought by the Prince of Wales* the defendant shall wage his law.

2 Roll. Abr. 110.

In a debt by *a merchant stranger* it lies not.

Palm. 14, Godfrey and Dixon's case.

Where one is *indebted by specialty to a man attainted*, the king shall have it, &c., *contra* if it be without specialty; for there the debtor may wage his law against the person attainted: *contra against the king*, though it was *upon contract only;* and therefore he shall be in a worse case than he was before, and so the king shall not have the debt. *Per* Hamm. and Holt, *quod non negatur.*

Bro. *Ley Gager*, pl. 25, cites 49 E. 3, c. 5. A man cannot wage his law against the

(G) In what Cases the Defendant is barred from waging Law.

king. Bro. *Ley Gager*, pl. 72, cites 50 E. 3, c. 1; 4 Rep. 95 b, in a note of the reporter it is said, that in every *quo minus* in the Exchequer, brought by the king's debtor against one who is indebted to him upon simple contract, the defendant shall not have his law for the benefit of the king, as appears in 8 H. 5; Ley, 66; 10 H. 7, c. 6, and yet there the king is not party; *à fortiori* where such debt or duty is forfeited to the king, and he is the sole and immediate party.——For *debt forfeited to the king by common law* no *ley gager* lies. Cro. Car. 187, Morgan v. Green.

In a *quo minus in Scaccario* against him who *usurped upon the possession of the king, which was leased to the plaintiff*, so that he could not pay his farm to the king, the defendant may wage his law, as appears in a short note there, where it is said, that in 4 E. 4, it was adjudged that a man may wage his law in a *quo minus;* but *contra anno* 8 H. 5, tit. *Ley*, pl. 66, in Fitz. which was agreed for law. 35 H. 8.

Bro. *Ley Gager*, pl. 102, cites 32 H. 6, c. 24.

In debt by *assignee of commissioners of bankrupts* the defendant pleaded *nil debet*, and waged his law: and the court held that he might, though the interest and power to sue in his own name be good to the plaintiff by the statute of bankrupts. But otherwise, if the duty itself had been originally due by the statute.

Noy, 112, Osborne v. Bradshaw, cites 10 H. 7, c. 18.

If an *infant* be *plaintiff*, the defendant shall not wage his law.

1 Inst. 295 a.

An action doth not lie against an *executor* upon a *concessit solvere* of the testator upon a special custom, *per* Rolle, C. J., for this would be to charge an executor in an action of debt, where he may by the law wage his law, and an action of debt lies not against the executor upon a simple contract made by the testator. *Adjournatur.*

Sti. 199, Hodges v. Jane.

(G) In what Cases the Defendant is barred from waging his Law, by having examined the Plaintiff or his Attorney.

THE defendant's right of examining the plaintiff or his attorney, is founded on the 5 H. 4, c. 8, by which it is provided, That

To eschew mischiefs which be as well within London as other places, of that divers feigned suits of debt have been taken by the people of the said places against divers people, surmising that they accounted before their apprentices, and sometimes other their servants, auditors assigned, of divers receipts, duties, and contracts had betwixt them, and that they were found in arrearages upon the account in divers great sums, where there was never receipt nor duty betwixt such parties, to the intent to make them against whom such suits were taken, to put them in inquest, and to put them from the waging of their law; the judges before whom such actions shall be sued in cities and boroughs shall have power to examine the attorneys, and others, and thereupon to receive the defendants to their law, or to try the same by inquest after the discretion of judges.

If before this statute a man had entered into an account before two auditors for a thing which lay not in account, and they found him indebted, upon which the other brought writ of debt against him, it was no plea for the defendant, that the matter lay not in account; for it was his folly to enter into the account; and so at the common law the defendant was without remedy. But now by this statute he may tender his law, and pray that the party be examined, whether it lies in account or not, and if it be found that it does not, the defendant shall make his law and go his way; but by the common law, the defendant ought to answer to the debt, which is the end of the account, and the judgment of the auditors, and the matter of account is only conveyance. *Per* Frowike, Kelw. 82 b, pl. 3.——It seems, by the meaning of this statute of the

(G) In what Cases the Defendant is barred from waging Law.

examination of the attorney of the plaintiff in debt upon arrearages of account before auditors, *the wager of law does not lie, but* that *nihil debet per patriam* shall be received in debt upon arrearages of account before auditors. *E contrà*, 50 E. 3, against *jailer, for escape of one condemned before auditors assigned.* Dy. 145, pl. 63, Wise's case.

In debt upon arrears *of account* the *defendant tendered his law and prayed that the plaintiff be examined*, and *so he was and said*, upon oath *that it is as he has counted*, by which the defendant was compelled to answer without his law: and so see that where the defendant prays that the plaintiff be examined or sworn, this is peremptory to the plaintiff in this point, and so is the *ley gager* of the part of the defendant, and so is the oath of the plaintiff in London by the custom, where if the defendant prays that the plaintiff show his declaration, and he do so, there the defendant by this shall be condemned.

Bro. *Examination*, pl. 18, cites 19 H. 6, c. 43.

So, *in debt upon arrears of account*, defendant *prayed that the plaintiff's attorney be examined if the matter lies in account;* and so he was, notwithstanding that no issue was tendered; and upon examination of the attorney, *it appeared that it was for stuff bought by the defendant of the plaintiff*, for which he tendered his law and was admitted.

Bro. *Examination*, pl. 15, cites 14 H. 4, c. 19. If the attorney refuses to be examined the defendant shall be admitted to his law. Bro. *Examination*, pl. 33, cites 33 H. 6, c. 24.

In *debt by two executors*, who *counted of arrears of account made in the time of their testator:* the *defendant tendered his law*, that he owed them, and *prayed that they be examined;* and the opinion of the court was that they shall be examined of another's deed: *contra of an attorney;* for he may have information of his master, &c. And the cause of this examination given by the statute is, that if it be *found upon examination of the party* upon a book *that the matter does not lie in account*, then the law lies; and so this case is out of the case of the statute of examinations, by the opinion of the court.

Bro. *Examination*, pl. 5, cites 3 H. 6, c. 46, S. P.; Bro. *Examination*, pl. 6, cites 9 H. 6, c. 8, S. P.; Ibid. pl. 7, cites 9 H. 6, c. 58. Where executors bring action, or where action is brought against them, *examination does not lie;* for this is to have the *ley gager* and *executors cannot wage their law.* Bro. *Examination*, pl. 22, cites 20 E. 4. c. 3, *per* Brian and Littleton.—*Debt by an executor upon arrears of account before auditors in the time of the testator*, the defendant tendered his law, and prayed that the plaintiff be examined, and *the executor was examined*, though it was of another's deed, *but not precisely*, whether he saw or heard of the account, or was present at it; *but whether any matter which proves that it lay in account, came to his hands, and of other points at the discretion of the justices*, but *not of the truth of the deed precisely;* and upon the examination it was awarded, that the defendant answer without his law; *quod nota.* Bro. *Examination*, pl. 19, cites 21 H. 6, c. 54, 55.—*But* if *such action* was *brought against an executor*, the *plaintiff shall be examined.* Ibid.

OF WARRANTY.

A WARRANTY (concerning freeholds and inheritances) (*a*) is a covenant real annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher, or by judgment in a writ of *warrantia chartæ*, to yield other lands and tenements to the value of those that shall be evicted by a former title, else it may be used by way of *rebutter*.

1 Inst. 365 a. βAn action of covenant will lie upon the words of a deed "will warrant and defend the premises to A B and his heirs for ever:" and this from necessity, as otherwise the buyer would be without a remedy in many cases, for the writ of *warrantia chartæ* is not in use. Ricketts v. Dickens, 1 Murph. 343.ϑ (*a*) There are also warranties of goods and chattels upon contracts; but warranties of lands, &c., only are here spoken of.——☞For warranties of goods and chattels, see vol. i. tit. *Actions on the Case*, letter (E). βWarranty, in its original form, it is presumed, has never been known in the United States. The more plain and pliable form of covenant has been adopted in its place. See 4 Kent, Com. 457; 2 Rawle, 67, n.; 9 Serg. & R. 268; 11 S. & R. 109; 4 Dall. 442; 2 Wheat. 45; Bouv. L. D. h. v.ϑ——Lord Coke says, that the learning of warranties is one of the most curious and cunning learnings of the law, but the subtlety out of this learning is, as will be shown, greatly abridged by the statute law.

For the better consideration of this subject, we shall reduce it under the following heads, under which we shall examine,—

(A) The several Kinds of Warranties.

(B) To what things a Warranty may be annexed.

(C) What Words and Clauses in a Deed will make a Warranty.

(D) What shall be deemed a good Warranty in Deed.

(E) What shall be deemed a good Warranty in Law.

(F) Of the Nature of a lineal Warranty, and how far it shall bind.

(G) What shall be deemed sufficient Assets to make a lineal Warranty a Bar.

(H) Of the Nature of a collateral Warranty at Common Law, and how far it shall bar.

(I) Of the Alterations introduced by the Statute Law.

(K) What shall be deemed Warranties by Disseisin, Abatement, or Intrusion.

(L) Of the Effects of Warranty in Deed.

(M) What Use may be made of a Warranty in Deed.

(N) Who may take Advantage of a Warranty, and against whom.

(O) When a Warranty shall be said to be defeated, determined, suspended, or avoided.

(P) How Warranties shall be expounded.

β(Q) Of Warranties in the sale of Personal Chattels.

1. Express Warranties.
2. Implied Warranties.ϑ

(A) The several Kinds of Warranties.

WARRANTIES, in their more general divisions, are of two kinds. First, a warranty in deed, or an express warranty, which is when a fine

(B) To what Things a Warranty may be annexed.

or feoffment in fee, or a lease for life is made by deed, which has an express clause of warranty contained in it, as when a conusor, feoffor, or lessor, covenants to warrant the land to the conusee, feoffee, or lessee.

2 Inst. 365.

Secondly, a warranty in law, or an implied warranty, which is when it is not expressed by the party, but *tacitè* made and implied by the law.

A warranty in deed is either lineal or collateral.

A lineal warranty is a covenant real, annexed to the land by him who either was owner of or might have inherited the land, and from whom his heir lineal or collateral might by possibility have claimed the land as heir from him that made the warranty.

1 Inst. 370.

A collateral warranty is made by him that had no right, or possibility of right to the land, and is collateral to the title of the land.

Also, there is a warranty which commences by disseisin or wrong.

Lit. sec. 698.

Warranties likewise may be said to be either *general*, viz., by one and his heirs to another and his heirs; or *particular*, and restrained to a certain person.

(B) To what Things a Warranty may be annexed.

A WARRANTY may not only be annexed to freeholds, or inheritances corporeal, which pass by livery, as houses and lands; but also to freeholds or inheritances incorporeal, which lie in grant, as advowsons; and to rents, commons, estovers, and the like, which issue out of lands or tenements: and it may not only be annexed to inheritances *in esse*, but also to rents, commons, estovers, &c., newly created. As a man (some say) may grant a rent, &c., out of land for life, in tail, or in fee with warranty; for though there can be no title precedent to the rent, yet there may be a title precedent to the land out of which it issueth before the grant of the rent, which rent may be avoided by the recovery of the land, in which case the grantee may help himself by a *warrantia chartæ* upon the especial matter. And so warranty in law may extend to a rent, &c., newly created; and therefore if a rent newly created be granted in exchange for an acre of land, this exchange is good, and every exchange implieth a warranty in law. And so a rent newly created may be granted for owelty of partition.

1 Inst. 366.

If a man seised of a rent-seck, issuing out of the manor of Dale, taketh a wife, and the husband releaseth to the terre-tenant, and warranteth *tenementa prædicta*, and dieth, and the wife bringeth a writ of dower of the rent, the terre-tenant shall vouch, for that albeit the release enured by way of extinguishment, yet the warranty extendeth to it, and by the warranty of the land, all rents, &c., issuing out of the land, that are suspended or discharged at the time of the warranty created, are warranted also.

1 Inst. 366.

But a warranty doth not extend to any lease, though it be for many thousand years, or to estates of tenant by statute staple, or merchant, or *elegit*, or any other chattel, but only to freeholds or inheritances. And this is the reason, that in actions which lessee for years may have, a warranty cannot be pleaded in bar; as, in an action of trespass, or upon

(C) What Words and Clauses in a Deed will make a Warranty.

the statute of 5 R. 2, and the like. But in such actions, which none but a tenant of the freehold can have, as upon the statute of 8 H. 6, assize, or the like, there a warranty may be pleaded in bar.

1 Inst. 389 a.

A warranty may be made upon any kind of conveyance, as upon fines, feoffments, gifts, &c. Also a warranty may be made by and upon releases and confirmations made to the tenant of the land, although he who makes the lease or confirmation has no right to the land, &c. And yet some have holden, that no warranty can be raised upon a bare release or confirmation, without passing some estate, or transmutation of the possession. But the law is otherwise; for if A be seised of lands in fee, and B release to him, or confirm his estate in fee with warranty to him, his heirs and assigns, this warranty is good, and both the party and his assignee shall vouch.

1 Inst. 385 a.

(C) What Words and Clauses in a Deed will make a Warranty.

THE word *warrantizo*, or warrant, is the only apt and effectual word to make an express warranty, or a warranty in deed, and therefore this word is used in fines.

1 Inst. 384.

And the words *defendo*, or *acquitto*, although they are commonly used in deeds, yet of themselves, without the other, will not make a warranty.

1 Inst. 384; Litt. sect. 733; 5 Rep. 17, 18, Spencer's case.

The words *dedi et concessi*, or *dedi* only, in a feoffment, make a warranty, when an estate in fee or inheritance passes by the deed.

1 Inst. 384.

But the word *concessi* only, or *demisi et concessi*, do not make such a warranty, in the case of a freehold or inheritance.

5 Rep. 18, Spencer's case.

And by force of the statutes of Bigamis, chap. 6, *dedi* is made an express warranty during the life of the feoffor.

1 Inst. 384; 4 Rep. 81, Noke's case.

If a man by deed warrants land to J S and his heirs, and the warrantor does not bind his heirs to the warrantee; or does not warrant to J S and his heirs, but to J S and his assigns, these are good warranties.

Dyer, 42; 1 Inst. 383.

But if a man makes a feoffment in fee, and warranty to the feoffee only, without naming his heirs, there the warranty shall endure only for life, because it is taken strictly. And yet if the feoffee recovers in value, he shall recover fee-simple, because he loses fee-simple.

Dyer, 42.

If a man makes a feoffment to one and his heirs, and binds himself and his heirs to warranty against all people, and does not say with certainty to whom, nor for how long he will warrant, yet the feoffee will have a fee-simple in the warranty, as he had in the land: but, if the intent of the warranty appears plainly by express words, the warranty shall extend no farther.

Dyer, 42.

β In Pennsylvania, Arkansas, Delaware, and Missouri, the words "grant, bargain, and sell," are an implied covenant that the grantor has done no

(D) What shall be deemed a good Warranty in Deed.

act or created any encumbrance by which the estate might be defeated, but do not create a general warranty.

Gratz v. Ewalt, 2 Binn. 95; Balliot v. Bowman, 2 Binn. 98; Fonk v. Voneida, 11 S. & R. 109; Bender v. Fromberger, 4 Dall. 440; 3 Penns. 313; Bouv. L. D., *Grant, Bargain and Sell.*

Where there is a general warranty that, at the time of the conveyance, the grantor was "seised of an indefeasible estate in fee-simple," followed by a special warranty against himself and his heirs, the special warranty does not control the precedent general covenant.

Bender v. Fromberger, 4 Dall. 436.g

(D) What shall be deemed a good Warranty in Deed.

A WARRANTY in deed, or an express warranty, as has been said, is created only by the word *warrant.* And

It is to be premised, that to every good warranty in deed, in order that it may bar and bind, these following circumstances are requisite.

First, That the person that warrants be a person able; for if an infant makes a feoffment in fee of land, and thereby binds him and his heirs to warrant the land, in this case, although the feoffment be only voidable, yet the warranty is void.

1 Inst. 367 b.

But, if a man of full age and an infant make a feoffment in fee with warranty, this warranty is not void in part, and good in part; but it is good for the whole against the man of full age, and void as to the infant.

1 Inst. 367 b.

Secondly, That the warranty be made by deed in writing; for if a man makes a feoffment by word, and by word binds him and his heirs to warrant the land, this is not a good warranty.

So, if a man gives land to another by his last will, and thereby binds him and his heirs to warrant it; this warranty, although the will be in writing, is void, because a will in writing is no deed.

1 Inst. 386.

Thirdly, That there be some estate to which the warranty is annexed that may support it; for if one covenant to warrant land to another, and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted; in these cases the warranty is void.

10 Rep. 96.

Likewise, if the estate to which the warranty is annexed is determined, the warranty dependent on it is determined likewise. Thus, if a man maketh a gift in tail, and warranteth the land to him and his heirs, and afterwards tenant in tail maketh a feoffment and dieth without issue, he shall not rebut the donor in a formedon in reverter, because that the estate to which the warranty is annexed is determined.

10 Rep. 96.

Fourthly, That the estate to which the warranty is annexed, be such an estate as is able to support it, and therefore that it be a lease for life at the least; for if one makes a lease for years of land, and binds himself and his heirs to warrant the land; this is no good warranty, neither will it have the effect of a warranty; but this may amount to a covenant, on which an action of covenant may be brought.

1 Inst. 378; 5 Rep. 17, Spencer's case.

(D) What shall be deemed a good Warranty in Deed.

Fifthly, That the warranty descends upon him that is heir of the whole blood by the common law to him that made the warranty, and not upon another; for if tenant in tail in *borough English* discontinues the tail, and has issue two sons, and the uncle releases to the discontinuee with warranty, and dies; this is no good warranty to bind the younger son.

1 Inst. 12; Litt. sect. 735. Because a warranty cannot go according to the nature of tenements by the custom, &c., but only according to the form of the common law. Litt. ibid.

So, if in this case tenant in tail discontinues the tail with warranty, &c., having two sons, and dies seised of other lands in the same borough in fee-simple, to the value of the land in tail; the younger son is not barred by this warranty.

1 Inst. 12; Lit. 735, and it is there added, that the younger son shall not be barred, though assets in fee-simple descend to him from his father.

So, if one gives his land to the eldest son and the heirs male of his body, the remainder to the second son, &c., and the eldest aliens with warranty, having issue a daughter and dies; this is not a good warranty to bar the second son.

Litt. sect. 718. The reason is, because the warranty descended to the daughter of the elder son, and not to the second son. Litt. ibid.

So, if tenant in tail has issue two daughters by divers venters, and dies, and they enter, and a stranger disseises them, and one of them releases all her right, and binds her and her heirs to warrant it; in this case the warranty is not good to bar the sister, because they are of half blood only, and the one cannot be heir to the other according to the course of the common law.

Lit. 737.

So, if two brothers be by demi-venters, and the eldest release with warranty to the disseisor of the uncle, and dies without issue; this is no good warranty to bar the younger brother; for a warranty, as has been said, must descend upon him that is heir at the common law to him that made it.

1 Inst. 387.

Sixthly, It is necessary that he that is heir do continue to be so, and that neither the descent of the title nor the warranty be interrupted; for if one binds him and his heirs to warranty, and after is attainted of treason or felony, and dies; this warranty does not bind his heir.

Litt. sect. 745.

So, if tenant in tail be disseised, and after release to the disseisor with warranty, and after the tenant in tail be attainted of felony, and have issue and die; this warranty will not bind the issue.

Litt. sect. 746. The reason is, for that nothing in this case maketh a continuance but the warranty, which cannot descend to the issue in tail, because the blood between the issue and him that made the warranty is corrupt. Id. ibid.

Seventhly, That the estate of freehold that is to be barred be put to a right before or at the time of the warranty made, and that he to whom the warranty descends have then but a right of the land; for a warranty will not bar an estate of freehold or inheritance *in esse*, in possession, in reversion, or remainder, that is not displaced and put to a right before or at the time of the warranty made, though after at the time of the descent of the

warranty, the estate of freehold or inheritance be displaced and devested.

10 Rep. 96, Seymor's case.

And therefore if there be a father and son, and the son have a rent-service, suit to a mill, rent-charge, rent-seck, common of pasture, or other profit apprender out of the land of the father, and the father make a feoffment in fee with warranty, and die; this shall not bar the son of the rent, common, &c.

10 Rep. 96, Seymor's case. The reason is, for that the son was actually seised of the rent or common at the time of the warranty, and he who is in possession needeth not put in his claim, either to avoid the fine or collateral warranty.

And although the son, after the feoffment with warranty, and before the death of the father, had been disseised, and so being out of possession the warranty had descended upon him, yet this warranty shall not bind him.

10 Rep. 96, Seymor's case. Because the warranty at the time of the creation of it did not extend to any estate of freehold or inheritance *in esse*.

So, if my collateral ancestor releases to my tenant for life with warranty, and dies, and this warranty descends upon me; this shall not bind my reversion or remainder.

10 Rep. 96, Seymor's case.

But, if in the case before, the son be disseised of the rent, &c., and affirm himself to be disseised by the bringing of an assize, (for otherwise he shall not be said to be out of possession of a rent, or the like,) and after the father release with warranty, and die; in this case, the collateral warranty shall bar and bind the son of his rent, &c.

10 Rep. 96, Seymor's case.

And if in the last case my tenant for life be disseised, and my ancestor release to the disseisor with warranty, and die; this is a good warranty to bind and bar me.

10 Rep. 96, Seymor's case. Because my reversion, as well as the estate of the tenant for life, was devested at the time of the warranty made.

Eighthly, That the warranty take effect in the lifetime of the ancestor, and that he be bound by it; for the heir shall never be bound by an express warranty, but where the ancestor was bound by the same warranty, and therefore a warranty made by will is void.

Litt. 734.

Ninthly, That the heir claim in the same right that the ancestor does; for if one be a successor only in a case of a corporation, he shall not be bound by the warranty of a natural ancestor.

1 Inst. 370.

Tenthly, That the heir that is to be barred by the warranty be of full age at the time of the fall of the warranty; for if the ancestor make a feoffment, or a release with warranty, and the heir at this time be within age, and after he die, and the warranty descend upon him within age; this warranty shall not bind him: but, if he become of age after the warranty of the ancestor, and before his death, in this case the warranty may bar him; therefore he must take care not to suffer a descent after his full age, before his entry.

1 Rep. 140 b, Chudleigh's case.

(E) What shall be deemed a good Warranty in Law.

WARRANTIES in law are so called, because, in judgment of law, they amount to a warranty without the use of the word *warrant*.

1 Inst. 384.

Thus, the words *dedi et concessi*, or *dedi* only, in a feoffment, make a good warranty in law to the feoffee and his heirs during the life of the *feoffor*.

But not against the heir of the feoffor, for the heir shall not be bounden unto a warranty made by his father, unless he bind him and his heirs to warranty by express words in the deed. F. N. B. 134. [Vide Gilb. Ten. by Watkins, note lvi.] β See Ricketts v. Dicketts, 1 Murph. 343; S. C., 1 Car. Law Rep. 77; Powell v. Lyles, 1 Murph. 348.g

But the word *concessi* only in a fine or feoffment does not make a warranty in law.

A warranty in law may be good in its creation, although it be without deed; for if a man by his last will and testament devises lands to another man for life, or in tail, rendering rent; to this estate there is a warranty in law annexed.

1 Inst. 386.

And although there be an express warranty in the deed, yet this does not take away the implied warranty of the law.

1 Inst. 384.

Every partition and exchange implies in it, and has annexed to it, a special warranty in law.

1 Inst. 102, 384.

If one makes a gift in tail, or lease for life, of land by deed or without deed, reserving a rent, or of a rent-service of deed; in these cases there is annexed an implied warranty against the donor or lessor, his heirs and assigns.

1 Inst. 334. The assignee likewise of lessee for life shall take the benefit of this warranty in law.

So, when dower is assigned to a woman, there is a warranty in law included, which is that the tenant in dower being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable.

1 Inst. 384.

And this warranty in law is of the nature of a lineal warranty, and shall bind as a lineal warranty only, for it never bars any collateral title.

1 Inst. 384.

And hence it is, that this warranty and assets in some cases is a good bar; as, if a tenant in tail exchanges for other lands which are descended to the issue, and he has accepted of them, or if not, that other lands are descended to him.

1 Inst. 384.

But if tenant in tail of lands makes a gift in tail, or lease for life, rendering rent, and dies; this is no bar.

1 Inst. 384.

And yet if other assets in fee-simple descend, this warranty in law and assets is a good bar.

(F) Of the Nature of lineal Warranty, and how far it shall bind.

A WARRANTY is called lineal, when, if no deed with warranty had been made by the father, then the right of the tenements should descend to the heir, and the heir should convey the descent from his father, &c.

Litt. sec. 703.

(F) Of lineal Warranty, and how far it shall bind.

And it is added by Lord Coke, that it is called a lineal warranty, not because it must descend upon the lineal heir; for be the heir lineal or collateral, if by possibility he might claim the land from him that made the warranty, it is lineal, having regard to the warranty and title of the land.

1 Inst. 370.

As, where a man seised of lands in fee, maketh a feoffment by his deed to another, and binds himself and his heirs to warranty, and hath issue and dies, and the warranty descends to his issue, this is a lineal warranty.

Litt. sec. 703.

So, if there be a grandfather, father and son, and the grandfather be disseised, and the father release to the disseisor being in possession with warranty, &c., and die, and after the grandfather die; this is a lineal warranty to the son: and although in this case the warranty descends before the right, yet it is a good bar.

Litt. sec. 706; 1 Inst. 371.

Likewise, if there be two brothers, and the father be disseised, and the eldest brother release with warranty, and die without issue, and after the father die, and the warranty descend to the younger son; this is a lineal warranty to him; for though the eldest son died in the lifetime of the father, yet he might possibly have conveyed the title to his younger brother, if no such warranty had been.

Litt. sec. 707.

And in every case where one demands an estate-tail, if any ancestor of the issue in tail, whether he had possession of the land or not, has made a warranty, and if the issue, that was to bring a writ in *formedon*, may or might by possibility have conveyed to himself a title by force of the gift by him that made the warranty; this is a lineal warranty, whereby the issue in tail shall not be barred, except he have assets to him descended in fee-simple.

Termes de la Ley, tit. *Garranty*.

As, if a man be seised of land of an estate-tail to him and his heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and have issue, and die; this warranty descending upon the issue is a lineal warranty.

And if lands be given to one and the heirs male of his body, and for want of such issue to the heirs female of his body, and the donee make a feoffment with warranty, and have issue a son and a daughter, and die; this warranty is lineal to the son, and if the son dies without issue male, it is a lineal warranty from the father to the daughter.

Litt. sec. 719.

But if the brother in his lifetime release to the discontinuee, &c., with warranty, &c., and after die without issue; this is a collateral warranty to the daughter.

Litt. sec. 719. The reason is, because she cannot convey to her the right which she hath by force of the remainder by any means of descent by her brother, for that the brother is collateral to the title of his sister, and therefore his warranty is collateral. Ibid.

If lands be given to the husband and wife and the heirs of their two bodies engendered, and they have issue a son, and the husband discon-

(G) What shall be deemed sufficient Assets, &c.

tinue, and die, and after the wife release with warranty, and die; this is a lineal warranty to the son.

Litt. 714. The son shall not be barred in this case unless he hath assets by descent in fee-simple by the mother, because their issue ought to convey their right as heirs to father and mother of their two bodies begotten, *per formam doni*, and therefore the warranty of the father and the warranty of the mother are but lineal warranties to the heir. Ibid.

And if lands be given to a man and woman unmarried, and the heirs of their two bodies, and they intermarry, and be disseised, and the husband release with warranty and die, and after the wife die; this is a lineal warranty to the issue for the whole.

1 Inst. 375. Because the issue must convey his right as heir to his father and mother of their two bodies engendered, and therefore it is collateral for no part. Ibid.

And if a father give land to his eldest son and the heirs male of his body, &c., the remainder to the second son, &c., if the eldest son alien in fee with warranty, &c., and have issue female, and die without issue male; this is a lineal warranty to the second.

Litt. 710.

It is a rule, as to the lineal warranties, that they bar the right to a fee-simple without assets, for he that demandeth fee-simple by any of his ancestors, shall be barred by warranty lineal which descendeth upon him, unless he be restrained by some statute.

Litt. c. 711.

But it doth not bar the right of an estate-tail, unless the heir have assets by descent in fee-simple by the same ancestor that made the warranty.

Litt. c. 712.

Yet if the issue in tail alien the assets descended, and die, the issue of that issue is not barred by this warranty and assets: but if the issue, to whom the warranty and assets descended, had brought a formedon, and by judgment had been barred by reason of the warranty and assets; in that case, though he aliens the assets, yet the estate-tail is barred for ever.

1 Inst. 393.

But for the more clear understanding what assets are requisite to bar the right of an entail, it will be proper to consider,

(G) What shall be deemed sufficient Assets to make a lineal Warranty a Bar.

THE assets requisite to make a lineal warranty a bar, must have six qualities. First, they must be assets (that is) of equal value, or more, at the time of the descent. Secondly, they must be of descent, if not by purchase or gift. Thirdly, they must be of assets in fee-simple, and not in tail, or for another man's life. Fourthly, they must descend to him as heir to the same ancestor that made the warranty. Fifthly, they must be of lands or tenements, or rents or services valuable, or other profits issuing out of lands or tenements, and not personal inheritances, or annuities, and the like. Sixthly, it must be in estate or interest, and not in use or right of actions, or right of entry; for they are no assets until they be brought into possession. But if a rent in fee-simple issuing out of land of the heir descend unto him, whereby it is extinct, yet this is assets; and to this purpose hath, in judgment of law, a continuance.

1 Inst. 374 b. A seigniory in frankalmoigne is no assets, because it is not valuable, and therefore not to be extended; and so it seemeth of a seigniory of homage and fealty. But an advowson is assets. Id. ibid.

(H) Of the Nature of a collateral Warranty at Common Law, and how far it is barred.

WHEREVER the heir cannot, by any possibility, convey to himself a title by force of his gift that made the warranty, then that is a collateral warranty, and thereby the right of the heir shall be barred without any assets.

Termes de la Ley, tit. *Garranty*.

As, if tenant in tail discontinue the tail, and have issue and die, and the uncle of the issue release to the discontinuee with warranty, &c., and die without issue, this is a collateral warranty to the issue in tail, because the warranty descendeth upon the issue who cannot convey himself to the entail by means of his uncle.

Litt. acc. 709. The reason that the warranty of the uncle having no right to the land entailed, shall bar the issue in tail, is, for that the law presumeth that the uncle would not unnaturally disinherit his lawful heir, being of his own blood, of that right which the uncle never had, but came to the heir by another means, unless he left him greater advancement. 1 Inst. 373 a. [Lord Chancellor Cowper said, that "a collateral warranty was certainly one of the harshest and most cruel points of the common law; because there was not so much as an intended recompense; yet he could not find, that Chancery had ever given relief in it." 10 Mod. 3, 4.] β See 1 Sumn. R. 262.ϑ

If there be father and two sons, and the father be disseised, and the younger son release with warranty to the disseisor, and die without issue, this is a collateral warranty to the eldest son, because that of such land as was the father's, the elder can by no possibility convey to him the title by means of the younger son.

Litt. sec. 707.

Likewise, if there be father and son, and the son purchase lands in fee, and the father of this disseise the son, and alien to another in fee by deed, and by the same deed bind him and his heirs to warranty, &c., and the father die, the son is barred by this warranty, which is a collateral warranty, though it descendeth lineally from the father to the son.

Litt. sec. 704. The reason is, for that if no such deed with warranty had been made, the son could in no manner convey his title from his father to him, inasmuch as the father had no estate in right to the land, but was collateral to the title of the land. Litt. sec. 705.

Also, if tenant in tail have issue three sons, and discontinue the tail in fee, and the middle son release by his deed to the discontinuee, and bind him and his heirs to warranty, and after the tenant in tail die, and the middle son die without issue, this is a collateral warranty to the eldest son, inasmuch as he can by no means convey to him, by force of the tail, any descent by the middle brother.

Litt. sec. 708. But if the eldest son die without issue, the youngest brother may recover, because the warranty of the middle one is lineal to the youngest. Ibid.

βA collateral warranty without assets, it seems, does not bind the heir.

Forster's Lessee v. Dugan, 8 Ohio, 87.

In Pennsylvania a collateral warranty descends upon the eldest son, and not upon all the heirs.

Jourdan v. Jourdan, 9 S. & R. 267.ϑ

Many other examples might be produced where these collateral warranties at common law did bind the right of estates in fee-simple, and also of estates in fee-tail. But the law in this respect has been greatly altered by the following statutes: and first by the statute of Gloucester.

(I) Of the Alterations introduced by the Statute Law.

BEFORE the statute of Gloucester all warranties which descended to them which were heirs to those who made the warranties, were bars to

the same heirs to demand any lands or tenements against the warranties, except the warranties which commenced by disseisin. For such warranty was no bar to the heir, for that the warranty commenced by wrong, viz., by disseisin.

Litt. sec. 697.

By this statute of Gloucester four things are enacted.

1st, That if a tenant by the curtesy alien with warranty, and die, this shall be no bar to the heir in a writ of *mort d'ancestor* without assets in fee-simple. And if lands or tenements descend to the heir from the father, he shall be barred, having regard to the value thereof.

1 Inst. 365.

2dly, That if the heir, for want of assets at that time descended, recover the lands of his mother by force of this act, and afterwards assets descend to the heir from the father, then the tenant shall recover against the heir the inheritance of the mother by a writ of false judgment, which shall issue out of the record, to resummon him that ought to warrant, as hath been done in other cases, where the heir being vouched cometh into court, and pleadeth that he hath nothing by descent.

1 Inst. 365.

3dly, That the issue of the son shall recover by a writ of *cosinage*, *aiel*, and *besaiel*.

Inst. 365.

And lastly, That the heir of the wife after the death of the father and mother, shall be barred of his action to demand the heritage of the mother by writ of entry, which his father aliened in the time of his mother, whereof no fine was levied in the king's court.

Likewise, by the 11 H. 7, c. 20. Where a wife after her husband's death shall, alone, or with her succeeding husband, alien, lease, confirm, or discontinue with warranty the land she holdeth in dower, or in tail, of the gift of her former husband, or any of his ancestors, such warranty, &c., is made void.

And lastly, by the 4 & 5 Ann. c. 16, "All warranties which shall be made after the first day of Trinity term, 1705, by any tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void and of no effect; and likewise all collateral warranties which shall be made after the said Trinity term, of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against his heir.

β The statute of 4 & 5 Anne has been re-enacted in New York, 4 Kent, Com. 469, 3d ed.; and in New Jersey, 3 Halst. 106; it is in force in Rhode Island, 1 Sumn. 235, and in Delaware, Harring. 50. In Kentucky and Virginia, it seems that collateral warranty binds the heir to the extent of assets descended. 1 Dana, 59. In Pennsylvania, collateral warranty of the ancestor, with sufficient real assets descending to the heirs, bars them from recovering the lands warranted. 2 Yeates, 509; 9 S. & R. 275; Bouv. L. D. *Collateral Warranty.*β {See 4 Dall. 168, Kesselman's Lessee v. Old.}

βThe statute of 4 & 5 Anne, c. 16, by which all collateral warranties are void, unless made by one who has an estate of inheritance, does not extend to Pennsylvania.

Eshelman v. Hoke, 2 Yeates, 509.β

(K) What shall be deemed Warranties by Disseisin, Abatement, or Intrusion.

WARRANTIES are said to commence by disseisin in the following cases: As,

Where there is father and son, and the son purchaseth lands, &c., and letteth it to the father, or any other ancestor, for term of years, or at will, and the father, &c., thereof by deed enfeoffeth another in fee, and binds him and his heirs to warranty, and the father dieth, whereby the warranty descendeth upon the son, this warranty commences by disseisin.

Litt. sec. 698.

In the same manner, if tenant by *elegit*, tenant by statute merchant, statute staple, guardian in chivalry, or socage, or because of nature, make a feoffment in fee with warranty; this shall not bind the heir, because such warranties commence by disseisin.

Litt. sec. 698, 699; 1 Inst. 367.

Also, if father and son purchase lands to have and to hold to them jointly, &c., and after the father alien the whole to another, and bind him and his heirs to warranty, &c., and after the father die, this warranty, as to the moiety which belongs to the son, commences by disseisin.

Litt. sec. 700.

But, if the purchase were to the father and the son, and the heirs of the son, and the father make a feoffment in fee with warranty, if the son enter in the life of the father, and the feoffee re-enter, and the father die, the son shall have an assize of the whole. If the son, however, had not entered in the life of the father, then, for the father's moiety, it had been a bar to the son, for that therein he had an estate for life, and therefore the warranty, as to that moiety, had been collateral to the son; and as to the son's moiety, it would be a warranty by disseisin, and so the warranty would be defeated in part and stand good in part.

1 Inst. 367 b.

If, on the other hand, the purchase had been to the father and son, and the heirs of the father, then the entry of the son in the life of the father, in avoidance of the warranty, had not availed him, because his father lawfully conveyed away his moiety.

1 Inst. 367 b.

If the father be tenant for life, remainder to the son in fee, and the father by covin and consent make a lease for years, to the end that the lessee shall make a feoffment in fee to whom the father shall release with warranty, and all this be executed accordingly, and the father die, this warranty begins by disseisin.

1 Inst. 365 b.

So, if one brother makes a gift in tail to another, and the uncle disseises the donee, and enfeoffeth another with warranty, and the uncle dieth, and the warranty descendeth upon the donor, and then the donee dieth without issue, this warranty also begins by disseisin.

1 Inst. 365 b.

If the father, the son, and a third person are joint-tenants in fee, and the father makes a feoffment in fee of the whole with warranty, and dieth, and the son dieth, the warranty as to the part of the son, and the part of the third person, begins by disseisin.

1 Inst. 367 a. And the third person shall not only avoid the feoffment for his own part, but for the part of the son.

(L) Of the Effects of a Warranty in Deed.

Also, if a man who hath no right, enters into lands, and makes feoffment of them with warranty, this commences by disseisin.

1 Inst. 369 b.

Lord Coke enumerates several qualities belonging to warranties, commencing by disseisin.

1 Inst. 366, 367.

First, That the disseisin is generally done immediately to the heir who is bound by the warranty.

Secondly. That the warranty and disseisin are *simul* and *semel*.

And yet if a man commit a disseisin with intent to make a feoffment in fee with warranty, although he make the feoffment many years after the disseisin, yet being done with that intent, it shall be a warranty commencing by disseisin.

5 Rep. 80, Fitzherbert's case.

The law is the same with respect to warranties commencing by abatement or intrusion, if the abatement or intrusion be made with intent to make a feoffment in fee with warranty, for these also commence by wrong.

1 Inst. 367 a.

So, if a tenant die without heir, and an ancestor of the lord enter before the entry of the lord, and make a feoffment in fee with warranty, and die, this warranty shall not bind the lord, because it commenceth by wrong, being in the nature of an abatement.

1 Inst. 367 a.

(L) Of the Effects of a Warranty in Deed.

The effect of a warranty in deed has been partly explained in considering the nature of the several kinds of warranty. It may be necessary however to observe, that a warranty in deed always bars the warrantor himself of the land so warranted for ever; so that all the present and future rights which he hath or may have therein are thereby extinct. Therefore,

If the father be disseised, and the son in his lifetime release all his right in the land to the disseisor, and make a warranty of the land in the deed, and then the father die, and the right of the land descend to the son; in this case, although the release does not bar the son, yet the warranty bars him.

1 Inst. 265 a and b.

For the most part, likewise, it bars the heirs of him who made the warranty, to whom the said warranty descends, to demand the land against the said warranty; for if the warranty be lineal, it is, as has been shown, a bar of an estate in fee-simple without any assets, that is, without any other land descended to him in fee-simple from the same ancestor that made the warranty; and with assets, it is a bar of an estate in tail.

1 Inst. 374 b, 384.

If the warranty be collateral, it is, with or without assets, a bar of an estate in fee-simple or fee-tail, and all possibility of right thereunto. But a collateral warranty doth not give a right, but only bindeth the right, so long as the warranty continueth; for if it be determined, removed, or defeated, the right is revived.

1 Inst. 372, 374 b.

(M) What Use may be made of a Warranty in Deed.

But neither the lineal nor collateral warranty can enlarge an estate; and therefore if the lessor by deed releases to his lessee for life, and warrants the land to him and his heir; this does not make his estate greater. Neither will it bar titles of entry or action in cases of mortmain, consent to a ravisher, mortgage, or dower: and therefore if an ancestor of the lord has title to enter upon an alienation in mortmain, and he releases and makes a feoffment with warranty, this warranty will neither bar him nor his heir.

10 Rep. 97, Edward Seymor's case; 1 Inst. 385 b, 389 a.

As to the warranty which commences by disseisin, it does not, as has been shown, bar any estate with or without assets.

No fine or warranty shall bar any estate in possession, reversion, or remainder, which is not divested and put to a right; for he who has the estate or interest in him, cannot be put to his action, entry or claim; for he has that already which entry, action, or claim can give him.

1 Inst. 388 b.

β A covenant of warranty is not broken without eviction, and this must be laid in the declaration.

Clark v. M'Anulty, 3 S. & R. 364. See Paul v. Witman, 3 Watts & S. 407.g

(M) What Use may be made of a Warranty in Deed.

Where a lineal or collateral warranty is a bar, there, if the party be impleaded by him who made the warranty, or his heirs, the party impleaded, who is tenant of the land, may plead and show forth his warranty against him, and demand judgment, whether, contrary to his own warranty, he shall be received to demand the thing warranted; and this in pleading is called a *rebutter*.

Termes de la Ley, tit. *Garranty*.

But if the party be impleaded or sued by *another* for the land in an action wherein he may vouch, then he to whom the warranty is made or his heirs may vouch, that is, call in the warrantor or his heirs to warrant the land. And this is an interpleader in the nature of an action brought by the warrantor against the warrantee, wherein he that vouches, who is called the voucher, is demandant, and he that is vouched, who is called the vouchee, is made tenant or defendant to the action, and the voucher is as it were out of the suit: and this second tenant, the vouchee, is called the tenant by the warranty; and hereupon a writ issues to the sheriff to summon the vouchee to appear, which writ is called a *summoneas ad warrantizandum*.

1 Inst. 101, 393.

If the vouchee appears, he must plead to the voucher: and if he shows cause why he should not warrant, that must be tried; and this showing of cause is called a counterplea to the voucher.

1 Inst. 101, 393.

But, if he pleads in avoidance of the warranty, it is called a counterplea to the warranty: and if he cannot defend himself against the warranty, the stranger shall recover the land demanded against the voucher, and he shall recover as much {1} other land against the vouchee of the lands he has or had at the time of the voucher: and this recovery of other lands is called a recovery in value.

1 Inst. 101, 393. {1} This recovery was only according to the value of the land at the time the warranty was created: if the land became of increased value afterwards,

(M) What Use may be made of a Warranty in Deed.

by the discovery of a mine, or by buildings, or otherwise, the warrantor was not to render in value according to that state of things, but as the land was when the warranty was made. 4 Dall. 442; 3 Mass. T. Rep. 543; 3 Cain. 112; 4 Johns. Rep. 22, and the cases there referred to. Personal covenants of warranty and of seisin have, in modern practice, superseded the ancient warranty: and opposite opinions have been entertained, in different states of the Union, with regard to the proper measure of damages in actions for the breach of those covenants:—whether it should be commensurate with the ancient warranty only, and therefore be the value of the land at the time of the purchase (ascertained by the consideration paid) with interest, or should be the value at the time of eviction. The former rule is adopted in New York. 3 Cain. 111, Staats v. Ex'rs of Ten Eyck; 4 Johns. Rep. 1, Pitcher v. Livingston; in Pennsylvania; 4 Dall. 441, Bender v. Fromberger; and in Virginia; 1 Hen. & Mun. 201, Lowther v. The Commonwealth; 2 Hen. & Mun. 164, Nelson v. Matthews; and the latter rule in South Carolina; 1 Bay. 19, Liber and wife v. Ex'rs of Parsons; Ibid. 265, Ex'rs of Gaerard v. Rivers; and in Connecticut, Kirby, 3. In Massachusetts a distinction is made between the covenant of warranty and the covenant of seisin. The principle with respect to both is, that the loss sustained at the time of the *breach of the covenant*, must be the measure of damages. But as the covenant of *seisin* is broken as soon as the deed is executed, if the grantor has not a title, and the covenant of *warranty* is not broken until eviction, the measure of damages, in the former case, is the consideration paid, with interest; in the latter, the value of the land at the time of eviction. 2 Mass. T. Rep. 433, Marston v. Hobbs; Ibid. 455, Bickford v. Page; 3 Mass. T. Rep. 543, Gore v. Brazier. And the principle of that distinction was also advocated by Spencer, J., in Pitcher v. Livingston, *ubi suprà*. But in that case, and also in those of Staats v. Ex'rs of Ten Eyck and Bender v. Fromberger, though in all of them the action was brought for a breach of the covenant of seisin, yet the decisions of the courts are founded upon principles applying with equal force to the covenant of warranty; and the former is considered as governed by the same rule with regard to damages as the latter. And the cases in Virginia were on covenants of warranty.—If there was any fraud or concealment, however, on the part of the vendor, he will be answerable, in an action on the case for deceit, for all the losses which may ensue. 4 Dall. 441; 3 Cain. 111; 4 Johns. Rep. 12.—If the title to part only of the land fails, the measure of damages, in general, is the value of that part taken in proportion to the price of the whole. But under some circumstances, the *relative* value of the land lost will be considered. 2 Johns. Rep. 43, 46, Mann and Toles v. Pearson; 5 Johns. Rep. 49, Morris v. Phelps; 2 Hen. & Mun. 164, Nelson v. Matthews; 1 Bay. 19, Liber and wife v. Ex'rs of Parsons.}

If the vouchee at the time of the voucher and recovery has no lands descended to him to answer the warrantee, but has afterwards lands falling to him by descent from that ancestor, then the voucher may have a resummons, and recover the land which afterwards falls.

1 Inst. 101, 393.

But, if the sheriff returns upon the summons that the vouchee is summoned, and he nevertheless maketh default, then he shall have a *magnum cape ad valentiam*, when, if he makes default again, the judgment shall be given against the voucher, and he shall recover over the value against the vouchee: and if the vouchee appears and then makes default, the voucher shall have a *parvum cape ad valentiam*, and then if he makes default, judgment shall be given as before.

1 Inst. 101, 393.

But, if the sheriff upon the summons returns that *he has nothing whereby he may be summoned*, then after writs of *alias* and *pluries*, a writ called *sequatur sub suo periculo*,(*a*) shall be awarded; and if the like return be made, the demandant shall have judgment against the first tenant, but he cannot recover in value against the vouchee, because he was never warned, and it appeareth that he hath nothing.

(*a*) It is called *sequatur sub suo periculo*, because the tenant shall lose his land without any recompense in value, unless he upon that writ can bring in the vouchee to war-

(N) Who may take advantage of a Warranty, &c.

rant the land unto him; and if at the *sequatur sub suo periculo*, the tenant and the vouchee make default, and the demandant have judgment against the tenant, and after bring a *scire facias* to have execution, the tenant may have a *warrantia chartæ;* and if he were impleaded by a stranger, he may vouch again. But if he had judgment to recover in value, he shall never have a *warrantia chartæ*, nor vouch again; for by this judgment to recover in value, he hath had the benefit of the warranty.

If the vouchee had a warranty from some other for the land, he may *deraign*, that is, maintain the warranty over, and shall recover in value also against his vouchee in the same manner as before.

But if the warrantee to whom the warranty is made, or his heirs, be impleaded in an assize, or in a writ of entry in the nature of an assize, in which actions they cannot vouch, then they shall have a writ *de warrantia chartæ* against the warrantor who made the warranty, or his heirs.

F. N. B. 34. If he be impleaded in any action in which he may vouch, then he ought to vouch to warranty; and if he will not, he shall not afterwards have a writ of *warrantia chartæ*.

Likewise, the warrantee or his heirs may, at any time before they be impleaded for the land, bring a *warrantia chartæ* upon the warranty in the deed against the warrantor or his heirs, and thereby all the land the heir of the warrantor has by descent from the ancestor who made the warranty, at the time of the writ brought, shall be bound and charged with the warranty, into whose hands soever it goes afterwards. So, if the land warranted be after recovered from the warrantee, he shall have so much land over again of the other land of the heir of the warrantor, or of the warrantor himself, if he be living: and although the warrantee or his heirs recover in this writ, yet upon occasion he may afterwards vouch the warrantor or his heirs notwithstanding.

F. N. B. 34.

It is to be observed, moreover, that it is good policy if a man suspect any thing, to bring this writ of *warrantia chartæ* betimes, because it binds all the lands of the warrantor from the time of the writ brought, and not any of his other land he had before that time, which are now aliened.

F. N. B. 34. But, if a man be vouched, he shall not render in value, but of the lands he had at the time of the voucher.

But, if a man recover his warranty by writ of *warrantia chartæ*, and have bounden the land which the vouchee had at that time: yet, if he be afterwards impleaded for that land for which he recovered his warranty, he ought to vouch him against whom he recovered his warranty, to defend the land, if he be sued in any action wherein he may vouch; otherwise, he shall not have advantage by recovery of his warranty in the *warrantia chartæ*.

F. N. B. 34.

And if a man recover his warranty in a *warrantia chartæ*, and afterwards be impleaded in an action in which he cannot vouch, as by assize or by a *scire facias* sued forth upon a fine, &c.; it seemeth he ought to give notice to him against whom he hath recovered his warranty of the action, and to pray him to show him what he shall plead to defend the land.

F. N. B. 34.

(N) Who may take Advantage of a Warranty, and against whom.

All such as are parties to the warranty, that is, such as are named in the deed, shall take advantage of the warranty; as if one warrant lands

to another, his heirs and assigns; in this case both the heirs and assigns may take advantage of it, and they may both vouch or rebut, or have a *warrantia chartæ* so as they come in in privity of estate; for otherwise the heirs or assigns cannot vouch, or have a *warrantia chartæ*, but yet they may, in many cases, rebut.(*a*)

1 Inst. 384 b, 385 a; 5 Rep. 71, Spencer's case. (*a*) As in disseisin, abatement, intrusion, usurpation, or otherwise, they shall rebut, by force of the warranty, as a thing annexed to the land.

But herein a difference is to be observed, when, in the cases aforesaid, he that rebutteth claimeth under the warranty, and when he that would rebut claimeth above the warranty, for there he shall not rebut.

1 Inst. 384 b, 385 a; 5 Rep. 71, Spencer's case.

Therefore, if lands be given to two brethren in fee-simple, with a warranty to the eldest and his heirs, and the eldest die without issue, the survivor, though he be heir to him, shall neither vouch nor rebut, nor have a *warrantia chartæ*, because his title to the land is by relation above the fall of the warranty, and he cometh not under the estate of him to whom warranty is made, as the disseisor, &c. doth.

If a man warrant lands to two men and their heirs, and the one make a feoffment in fee, yet the other shall vouch for his moiety.

1 Inst. 384 b, 385 a; 5 Rep. 71, Spencer's case.

If a man be enfeoffed with warranty to him, his heirs and assigns, and he make a gift in tail, the remainder in fee, and the donee make a feoffment in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee but he that cometh in in privity of estate; but he must vouch his feoffor, and he vouch as assignee; but such an assignee may rebut.

1 Inst. 384 b, 385 a; 5 Rep. 71, Spencer's case.

So, if the warranty be made to a man and his heirs without this word (*assigns*), yet the assignee, or any tenant of the land, may rebut.

If a man enfeoff A and B to have and to hold to them and their heirs, with a clause of warranty, *prædictis A et B et eorum hæredibus et assignatis;* in this case, if A die, and B survive and die, and the heir of B enfeoff C, he shall vouch as assignee; and yet he is but the assignee of the heir of one of them; for in judgment of law, the assignee of the heir is the assignee of the ancestor; and so the assignee of the assignee shall vouch *in infinitum*, within these words (his assigns).

1 Inst. 384 b.

If a man enfeoffeth A to have and to hold to him, his heirs and assigns, and A enfeoffeth B and his heirs, and B dieth, the heir of B shall vouch as assignee of A. So that heirs of assignees, and assignees of assignees, and assignees of heirs, are within this word (assigns).

1 Inst. 384 b.

But those who are not named for the most part shall not take advantage of the warranty; and therefore if land be warranted to J S without the word (heirs), his heirs shall not vouch; and regularly, if he warrant land to a man and his heirs without naming assigns, his assignee shall not vouch. Yet, if the father be enfeoffed with warranty to him and to his heirs, and the father enfeoff his eldest son with warranty, and die, the law giveth the son advantage of the warranty made to his father, because, by act of law, the warranty between the father and the son is extinct.

1 Inst. 384 b.

(N) Who may take advantage of a Warranty, &c.

The warranty wrought by the word *dedi*, and the warranty annexed to an exchange, partition, &c., do not extend to assignees. But yet in cases of exchange, and of warranties by the word *dedi*, the assignee shall rebut.

1 Inst. 384, a and b.

If a man make a feoffment in fee with warranty to him, his heirs and assigns, by deed, and the feoffee enfeoff another by parol, the second feoffee should vouch, or have a *warrantia chartæ*, as assignee, although he hath no deed of the assignment; because the deed comprehending the warranty doth extend to the assignees of the land, and he is a sufficient assignee, although he hath no deed.

1 Inst. 385 b.

If a man make a feoffment in fee to A, his heirs and assigns, and A enfeoff B in fee, who re-enfeoffeth A; he or his assigns shall never vouch, for A cannot be his own assignee. But if B had enfeoffed the heir of A, he might vouch as assignee; for the heir of A may be assignee to A, inasmuch as he claimeth not as heir

1 Inst. 385 b.

If one makes a feoffment to two, their heirs and assigns, and one of them makes a feoffment in fee, this feoffee in this case shall not take advantage as assignee.

1 Inst. 385 b.

But an assignee of part of the land shall take advantage of a warranty; as,

If a man makes a feoffent of two acres with warranty to him, his heirs and assigns, and the feoffee makes a feoffment of one acre of it to another, in this case the second feoffee shall take advantage of the warranty as assignee.

1 Inst. 385 a.

Therefore, there is a difference between the whole estate in part, and part of the estate in the whole, or in any part; for if a man has a warranty to him, his heirs and assigns, and he makes a lease for life or gift in tail; in these cases the lessee or donee shall not take advantage of the warranty as assignee, because they have not the estate in fee-simple, whereunto the warranty was annexed; but they may vouch the lessor or donor, and by this means take advantage of the warranty.

1 Inst. 385 a.

But if a lease for life be made, the remainder in fee, such a lessee may vouch as assignee, because the whole estate is out of the lessor, and the particular estate and the remainder do in judgment of law, to this purpose, make but one estate.

1 Inst. 385 a.

If a man enfeoffs a woman with warranty, and they intermarry and are impleaded, and upon default of the husband, the wife is received, in this case she may vouch her husband, *et sic è converso*, if a woman enfeoffs a man with warranty, and they intermarry and are impleaded, the husband in this case shall vouch himself and the wife.

1 Inst. 390.

He who comes into land merely by act of law in the *post*, as the lord by escheat or the like, shall never take advantage of a warranty; and there-

fore if tenant in dower enfeoffs a villein with warranty, and the lord of the villein enters, or a feoffment be to a bastard with warranty, and he dies without issue, and the lord enters by escheat, the lord shall never take advantage of these warranties.

3 Rep. 62 and 63, Lincoln College case.

But it is otherwise, where a man comes to the land by limitation of use, or by common recovery, which is the act of the party; for if tenant in tail being in of another estate, that is by disseisin, or feoffment of a disseisor, suffers a common recovery, and a collateral ancestor of the tenant in tail releases with warranty to the recoveror, and after the recoveror makes a feoffment to uses, which are executed by the statute of 27 H. 8, and after the collateral ancestor dies; in this case the terre-tenants may take advantage of the warranty by way of rebutter, although the estate be transferred in the *post.*

3 Rep. 62 and 63, Lincoln College case.

So, if he to whom the warranty is made suffers a common recovery, and after the ancestor dies; the recoveror may take advantage of the warranty by way of rebutter; for any man that has the possession of land, although he has no deed to show how he got possession of it, or how he is assignee, may rebut the demandant, and so bar him, and defend his own possession.

3 Rep. 62 and 63, Lincoln College case.

Therefore, tenant by the curtesy, donee in tail, who is in of another estate, an assignee by force of a warranty made to a man and his heirs, feoffee of a donee in tail, may rebut and bar the demandant by the warranty.

3 Rep. 62 and 63, Lincoln College case.

If one enfeoffs another of an acre of ground with warranty, and has issue two sons, and dies seised of another acre of land in the nature of *borough English;* in this case, although the warranty descends upon the eldest son only, yet both the sons may be vouched; one as heir to the warranty, the other as heir to the land.

1 Inst. 376. If he should vouch the eldest son only, he could not have the fruit of his warranty; that is, a recovery in value; and he cannot vouch the youngest son only, because he is not heir at common law, upon whom the warranty descends.

So it is also of heirs in gavelkind, the eldest shall be vouched as heir to the warranty, and the rest in respect to the inheritance.

1 Inst. 376.

In like manner, the heir at the common law, the heir of the part of the mother shall be vouched, or the heir at common law may be vouched alone at the election of the tenant.

1 Inst. 376.

The heir likewise at common law shall be vouched with the heir in *borough English.*

1 Inst. 376.

The bastard also shall be vouched with a mulier.

If a man dies seised of certain lands in fee, having issue a son and a daughter by one venter, and a son by another, and the eldest son enters, and dies, and the land descends to the sister; in this case, the warranty descends on the son, and he may be vouched as heir, and the sister also may be vouched as heir to the land.

1 Inst. 376.

(O) When a Warranty shall be said to be defeated, &c.

If two make a feoffment with warranty, and one of them dies, the survivor shall not be charged alone with the warranty, but the heir of him that is dead shall be charged also.

1 Inst. 386 b. But, if they are jointly bound in an obligation, the survivor only shall be charged.

Likewise, if two are bound to warrant land, and both of them die, the heirs of both of them ought to be vouched, and shall be equally charged.

3 Rep. 14, Sir Wm. Herbert's case.

If the heir be vouched in the award of three several persons, the one of them only shall not be charged, but they shall be charged equally.

3 Rep. 14, Sir Wm. Herbert's case.

If a woman, an heiress of the disseisor, enfeoffs me with warranty, and after she is married to the disseisee; in this case I may take advantage of this warranty against the disseisee, and rebut him upon it, if he sues me for the land.

1 Inst. 365 b.

So, if the husband and wife sue me for the land of the wife, and I have a warranty of a collateral ancestor of the husband's, which descended to the husband; I may make use of this to bar the husband and wife.

1 Inst. 365 b.

(O) When a Warranty shall be said to be defeated, determined, suspended, or avoided.

When a warranty is made to a man upon an estate which he then had, if the estate be defeated the warranty is defeated: and a warranty lineal or collateral may be defeated, determined, or avoided, in all or in part, and this is sometimes by matter in law and sometimes by matter in deed.

Litt. sec. 741; 1 Inst. 393 a and b.

If an estate-tail, to which a warranty is annexed, be spent, the warranty is determined: or, if a man make a gift in tail with warranty, and the donee afterwards make a feoffment, and die without issue, the warranty is gone.

Litt. sec. 741; 1 Inst. 393 a and b.

So, if tenant in tail discontinue the tail, and the discontinuee be disseised, or make a feoffment on condition, and a collateral ancestor of the issue release to the disseisor or feoffor on condition, with warranty, and after the discontinuee enter upon the disseisor, or on the feoffee, for the condition broken, in this case the warranty made by the collateral ancestor is gone.

1 Inst. 395 a and b.

Likewise, if a seigniory be granted with warranty, and the tenancy escheat, so that the seigniory is extinct, consequently, the warranty, which was annexed to it, is defeated.

1 Inst. 392 b.

If the father makes a feoffment to his eldest son, and dieth, and the warranty descends upon the son, the warranty is extinct.

1 Inst. 384 b. But if the father had been enfeoffed with warranty to him and his heirs, the son, as has been shown, might take advantage of the warranty made to his father.

If tenant in tail makes a feoffment to his uncle, and the uncle after-

(O) When a Warranty shall be said to be defeated, &c.

wards makes a feoffment in fee with warranty to another, and after the feoffee of the uncle doth re-enfeoff the uncle again in fee, and after the uncle enfeoffeth a stranger in fee without warranty, and dieth without issue, and the tenant in tail dieth, the warranty made to the first feoffee is hereby defeated.

Litt. sec. 743. Because the uncle took back to him as great an estate from his first feoffee to whom the warranty was made, as the same feoffee had from him; and if the warranty should stand, then the uncle would warrant to himself, which cannot be.

So, if the uncle makes the warranty to the feoffee, his heirs and assigns, and takes back an estate in fee, and after enfeoff another, yet the warranty is defeated, because he cannot be assignee to himself.

1 Inst. 390.

But if one makes a feoffment with warranty to the feoffee, his heirs and assigns, and the feoffee re-enfeoffs the feoffor and his wife, or the feoffor and a stranger; in these cases the warranty is not defeated, but continues still.

1 Inst. 390.

So, if two make a feoffment with warranty to one, his heirs and assigns, and the feoffee re-enfeoff one of the feoffors; in this case the warranty is not gone.

1 Inst. 390.

And if in the first case before put by Littleton, sec. 743, the feoffee makes an estate to his uncle in tail or for life, saving the reversion, or a release for life, the remainder over, &c., in this case the warranty is only suspended.

Litt. sec. 744; 1 Inst. 390. But it is otherwise, where the uncle hath as great estate in the land of the feoffee to whom the warranty was made, as the feoffee hath himself.

Also, if the uncle after such feoffment with warranty, or release with warranty, be attainted or outlawed of felony; hereby the warranty is gone; and although he afterwards obtain his pardon, yet the warranty is not revived.

Litt. sec. 745; 1 Inst. 391.

Also, if tenant in tail be disseised, and after make a release to the disseisor with warranty in fee, and after the tenant in tail be attaint or outlawed of felony, and have issue and die, in this case the issue in tail may enter upon the disseisor; for nothing makes a discontinuance in this case but the warranty, and the warranty cannot descend to the issue in tail, because the blood is corrupt between him that made the warranty and the issue: and if tenant in tail should obtain his pardon, the warranty, as has been said, would not revive.

Litt. sec. 746, 747; 1 Inst. 391.

But if tenant in tail at the time of his attainder had no issue, and after the obtaining of his pardon had issue, that issue would be bound by the warranty.

1 Inst. 392 a.

If a partition be made by judgment upon a writ of *partitione facienda*, by force of the statute of 31 H. 8, this does not defeat the warranty, because by writ they are compellable by the statute to make partition.

6 Rep. 12, Morrice's case.

But, if a feoffment with warranty be made to two or more, and they being

(O) When a Warranty shall be said to be defeated, &c.

joint-tenants, afterwards by deed make partition; by this the warranty is determined; for though they were compellable by writ to make partition, yet since they have not pursued the statute by making partition by writ, the warranty is gone.

6 Rep. 12, Morrice's case.

So, if there be two joint-tenants, and one of them disseises the other, and he that disseises recover in an assize, and have judgment to hold in severalty; hereby the warranty is determined.

6 Rep. 12, Morrice's case.

As warranties may be defeated and extinguished by matter in law, so likewise they may be discharged or defeated by matter in deed: and this in three several ways.

1 Inst. 392 b.

If the party that has the warranty, or the estate to which the warranty is annexed, releases to him that is bound to warrant all warranties, or all covenants real, or all demands; by either of these releases the warranty is gone.

Litt. sec. 748.

For, if one enfeoffs three with warranty to them and their heirs, and one of them releases to one of the other two; hereby the warranty is gone for that part. But, if one of them releases to the other two, in this case the warranty is not gone, but continues, and they may vouch upon it.

1 Inst. 385.

If tenant in tail enfeoffs his uncle, who enfeoffs another in fee with warranty, and the feoffee releases the warranty to his uncle; thereby the warranty is extinct.

1 Inst. 390.

But, if a gift in tail be made with warranty, in this case a release made by the tenant in tail of the warranty will not extinguish it.

1 Inst. 390.

If two make a feoffment in fee, and warrant the land to the feoffee and his heirs, and the feoffee releases the warranty to one of the feoffors; this does not determine the warranty of the other as to the moiety.

1 Inst. 393.

So if one enfeoffs two with warranty, and one of them releases the warranty; this does not extinguish the warranty for the other moiety, but it continues still.

1 Inst. 393.

If one warrants land to two men and their heirs, and one of them makes a feoffment in fee; hereby the warranty is not determined, but the other may vouch for his moiety.

1 Inst. 385.

As warranties may be defeated in the whole, so they may be defeated as to part of the benefit that may be taken of the same, as,

He who has a warranty may make a defeasance not to take any benefit by way of voucher: in the like manner that he shall take no advantage by way of *warrantia chartæ*, or by way of rebutter.

Inst. 393 a.

(P) How Warranties shall be expounded.

If the parties, between whom the warranty is, intermarry, hereby the warranty is suspended during the coverture in some cases.
1 Inst. 390.

If tenant in tail makes a feoffment in fee with warranty, and disseises the discontinuee, and dies seised; this suspends the warranty.
1 Inst. 390.

In some special cases there shall be no recoveries in value upon one warranty; as,

If a disseisor gives lands to the husband and wife, and to the heirs of the husband, the husband aliens in fee with warranty, and dies, the wife brings a *cui in vita*, the tenant vouches and recovers in value, if after the death of the wife the disseisee brings a *præcipe* against the alienee, he shall vouch and recover in value again.
1 Inst. 393 a.

So it is, where the wife brings a writ of dower against the alienee, he shall recover in value again upon the same warranty.
1 Inst. 393 a.

And it is in the same manner if a man be seised of a rent by a defeasible title, and release to the tenant of the land all his right in the land, and warrant the land to him and his heirs; if he be impleaded for the rent, he shall vouch and recover in value for the rent; and if he be impleaded for the land, he shall vouch and recover in value again for the land.
Inst. 393 a.

But in these and the like cases, the reason is in respect of the several estates recovered, but for one and the same estate he shall never recover but once in value; and though the land recovered in value be evicted, yet he shall never take benefit of the warranty after.
1 Inst. 393 a.

A warranty also may lose its force by taking benefit or making use thereof; for after a man has once taken advantage thereof in some cases, he can make no further use of it.
1 Inst. 393 a.

If in a *præcipe* the tenant vouches, and at the *sequatur sub suo periculo* the tenant and the vouchee make default, whereupon the demandant has judgment against the tenant: and afterwards the demandant brings a *scire facias* against the tenant to have execution; in this case the tenant may have a *warrantia chartæ*.
1 Inst. 393 a.

And if in that case a stranger had brought a *præcipe* against the tenant, the warranty lost not its force; but, if the tenant had judgment to recover in value against the vouchee, he should not vouch again by reason of that warranty, because he had taken advantage of the warranty.
1 Inst. 393 a.

(P) How Warranties shall be expounded.

It is a principle of law that all warranties in general are to be favourably construed, because they are part of men's assurances.

It is to be observed likewise, that in some cases warranties in law are not taken away by express warranties; as, if a man leaseth for life, and farther bindeth himself and his heirs to warranty, here the express warranty

(P) How Warranties shall be expounded.

doth not take away the warranty in law; for if he in reversion granteth over his reversion, and the lessee attorneth, and afterwards is impleaded, he may vouch the grantee by the warranty in law, or he may vouch the lessor by the express warranty.

4 Rep. 81, Noke's case.

So likewise, if a man make a feoffment in fee by the word *dedi*, with an express warranty in the deed, he may use the one or the other at his election; and the warranty wrought by this word *dedi* is a special warranty, and extendeth to the heirs of the feoffee during the life of the donor only. But upon an exchange, the warranty extendeth reciprocally to the heirs, and against the heirs of both parties; though the assignee shall not vouch by force of such warranties.

4 Rep. 81, Noke's case; 1 Inst. 384 a.

A partition implies a warranty in law.

4 Rep. 81, Noke's case; 1 Inst. 384 a.

So, if a man make a gift in tail or a lease for life of land by deed or without deed, reserving a rent, or of a rent-service by deed, this is a warranty in law; and the donee or lessee being impleaded shall vouch and recover in value; and this warranty in law extendeth not only against the donor or lessor and his heirs, but also against his assignees of the reversion; and so likewise the assignee of lessee for life shall take the benefit of this warranty in law.

1 Inst. 384 b.

When dower is assigned, there is a warranty in law included, that the tenant in dower, being impleaded, shall vouch and recover in value a third part of the two parts whereof she is dowable.

1 Inst. 384 b.

If a man of a full age and an infant make a feoffment in fee with warranty, this warranty is not void in part and good in part; but it is good for the whole against the man of full age, and void against the infant; for although the feoffment of an infant passing by livery of seisin be voidable, yet his warranty which taketh effect only by deed, is merely void.

1 Inst. 367 b.

If a man make a feoffment in fee, and bind his heirs to warranty, this is void, because the ancestor himself was not bound: also, if a man bind himself to warranty, and not his heirs, the heirs are not bound.

1 Inst. 386 a.

But a warranty in law may bind the heir, although it never bound the ancestor.

1 Inst. 386 a.

If a man for him and his heirs warrant lands unto another and his heirs, this is a general warranty, because it is not restrained to any person certain.

1 Rep. 1, Lord Buckhurst's case.

A warranty regularly doth extend to all things issuing out of the land; that is to say, to warrant the land in such plight and manner, as it was at in the hand of the feoffor, at the time of the feoffment with warranty, and the feoffee shall vouch, as of lands discharged of the rent, &c., at the time of the feoffment made.

1 Inst. 388 b.

If a woman that hath a rent-charge in fee, intermarrieth with the tenant

of the land, and a stranger releases to the tenant of the land, with warranty, he shall not take advantage of this warranty, either by voucher or *warrantia chartæ;* for the wife, if the husband die, or the heir of the wife living the husband, cannot have an action for the rent upon a title before the warranty made; for if the heir of the wife bring an assize of *mort d'ancestor*, this action is grounded after the warranty, whereunto, as has been said, the warranty shall not extend.

1 Inst. 388 b, and 389 a.

So it is, if the grantee of the rent grant it to the tenant of the land upon condition, which maketh a feoffment of the land with warranty, this warranty cannot extend to the rent; albeit the feoffment was made of the land discharged of the rent, for if the condition be broken, and the grantor be entitled to an action, this must of necessity be grounded after the warranty made.

1 Inst. 389 a.

But in the case aforesaid, when the woman, grantee of the rent, marrieth with the tenant, and the tenant maketh a feoffment in fee with warranty, and dieth; in a *cui in vita* brought by the wife, (as in law she may,) the feoffee shall vouch as of lands discharged at the time of the warranty made, for that heir title is paramount. So, if a tenant in tail of a rent-charge purchase the land, and make a feoffment with warranty, if the issue bring a *formedon* of the rent, the tenant shall vouch.

1 Inst. 389 a.

3(Q) Of Warranties in the Sale of personal Chattels.

1. *Express Warranties.*

If one sell a horse, warranting him to be sound, he is answerable on his warranty whether he knew the horse to be sound or otherwise.

Kimmel v. Lichty, 3 Yeates, 262.

To constitute an express warranty, it is not requisite that the word *warrant* should be used.

Jackson v. Wetherill, 7 S. & R. 482.

Warranty that a negro was born a slave, is not broken by a claim made by the negro to his freedom, originating under the laws of another state against the importation of slaves.

Davis v. Sandford, Litt. Sel. Cas. 206.

A warranty of the quantity of a cargo, is not an implied warranty that the whole is sound.

Jones v. Murray, 3 Monr. 84.

Where the seller affirms at the time of the sale that a horse is not lame, and says he would not be afraid to warrant him, this is a warranty.

Cook v. Moseley, 13 Wend. 277. See Whitney v. Sutton, 11 Wend. 441; Roberts v. Morgan, 2 Cowen, 438; The Oneida Manufacturing Society v. Lawrence, 4 Cowen, 440.

To constitute an express warranty, the affirmation, at the time, must be intended as a warranty; otherwise it is a mere opinion.

Sweet v. Colgate, 20 Johns. 196.

A sale by sample is *per se* a warranty that the bulk shall correspond with the sample.

Boorman v. Jenkins, 12 Wend. 566; Beebee v. Robert, 12 Wend. 413; Gallagher v. Waring, 9 Wend. 20; Andrews v. Kneeland, 6 Cowen, 354.

(Q) Of Warranties in the Sale of personal Chattels.

In the sale of personal property, when the property is defective, the seller will be responsible, first, when there is a special warranty, though the seller be ignorant of the defect; and secondly, when there was no special warranty, but the seller knew of the defect, and concealed it at the time of the sale.

Glasscock v. Wells, Cooke's R. 266. See Westmoreland v. Dixon, 4 Hayw. 223; 2 Yerg. 394.

Where a bill of sale of a negro contained the following words: "The said H and S do for ever warrant and defend the title of the said negro, from all persons whatever claiming or to claim her, and do likewise state that we have sold her to D as a sound and healthy negro;" this is a sufficient warranty of soundness.

Ditto v. Helm, 2 J. J. Marsh. 129.

Where a bill of sale of a slave contained these words: "About eleven years of age, sound and healthy, and do by these presents further covenant and agree to warrant the right," &c. Held, to amount to a warranty of soundness.

Gilchrist v. Marrow, 2 Car. L. Rep. 607. See Ayres v. Parks, 3 Hawks. 59.

Where the vendee proved, the vendor told him at the time of selling him a mare, that he was sure she was perfectly safe, kind, and gentle in harness: Held, that this did not amount to an express warranty so as to render him liable in *assumpsit*, although, if made falsely, it would render the seller liable to an action of deceit.

Jackson v. Wetherill, 7 S. & R. 482.

A warranty does not extend to things which, from the senses, may be discerned to be otherwise.

Schuyler v. Russ, 2 Caines, 202.

2. *Of implied Warranties.*

In sales of personal goods there is an implied warranty that the article sold corresponds with the commodity represented, unless there are circumstances to show the risk of determining not only the quality of the goods, but the kind he purchased; therefore, if the defendant sell, and the plaintiff purchase an article as "blue paint," and it is so described in the bill of parcels, this amounts to a warranty that the article to be delivered shall be blue paint, and not a different article.

Borrekins v. Bevan, 3 Rawle, 23. See Willing v. Consequa, 1 Pet. C. C. 317; Jackson v. Wetherill, 7 S. & R. 482; Kase v. John, 10 Watts, 109. But see Holden v. Dakin, 4 Johns. 421.

But though the seller is answerable to the buyer, that the article sold shall be in specie, the thing for which it was sold, yet if there be only a partial adulteration, which does not destroy the distinctive character of the thing, the buyer is bound by the bargain.

Jennings v. Gratz, 3 Rawle, 168. But see Defreeze v. Trumper, 1 Johns. 274.

The doctrine of implied warranty that the article sold is of ordinary quality of articles of its kind, applies only to articles susceptible of a standard quality, or which are sold by samples.

Pollard v. Lyman, 1 Day's Cas. 156.

An advertisement of property for sale, which gives it a higher character than it deserves, does not amount to a warranty as to the quality, if the purchaser relies upon his own examination.

Calhoun v. Vecchio, 3 Wash. C. C. 165; M'Farland v. Newman, 9 Watts, 55.

When one having possession of a personal chattel, sells it, his bare affirmation amounts to a warranty of the title; but when he is out of possession, it is otherwise.

Ritchie v. Summers, 3 Yeates, 531, 534; Boyd v. Bopst, 2 Dall. 91; Hook v. Robinson, Addis. 271.

Where the seller of a horse knew of a material defect, which in equity and good conscience he ought to have disclosed, and he did not disclose it, if this be unknown to the buyer, or it could not be presumed to be known to a buyer of common prudence, it will vitiate the contract.

Dixon v. M'Clutchey, Addis. 322; 3 Yeates, 262; Addis. 146.

Where the seller of a personal chattel makes a wilful misrepresentation, or conceals a material circumstance, this is a fraud; and the buyer may recover damages in proportion to his confidence in the seller.

Work v. Grier, Addis. 375.

A agreed to procure and deliver to B the note of W endorsed by two other persons, and afterwards he wrote to B a letter in which he said, "I enclose you the note of W's, as proposed, which you will please to pass to my credit." Held, that this was an implied warranty that the endorsements on the note enclosed were genuine.

Coolidge v. Brigham, 1 Met. 547.

The word *grant*, in a lease for years, is a warranty of the lessor's title.

Grannis v. Clark, 8 Cowen, 36.

A representation that the vessel insured is American, is equivalent to a warranty, though no warranty is contained in the policy.

Vandenheuvel v. Church, 2 Johns. Cas. 173, n.; Goix v. Low, 1 Johns. Cas. 341; Murray v. The United States Insurance Company, 2 Johns. Cas. 168; 2 Johns. Cas. 173, n.; 8 Johns. 307.

OF WASTE.

WASTE is the committing of any spoil or destruction in houses, lands, &c., by tenants, to the damage of the heir, or of him in reversion or remainder: whereupon the writ or action of waste is brought for the recovery of the thing wasted, and damages for the waste done.

In order to state the law relative to this head, we will consider it under the following divisions:

(A) In what Subjects Waste may be committed.

(B) Of the several Kinds of Waste.

(C) What Acts shall be deemed Waste: And herein,

1. *What shall be deemed Waste in Lands.*
2. *What shall be deemed Waste in Trees and Woods.*
3. *What shall be deemed Waste in digging for Gravel, Mines, &c.*
4. *What shall be deemed Waste in Gardens, Orchards, Fish-Ponds, Dove-Houses, Parks, &c.*
5. *What shall be deemed Waste with respect to Houses, &c. And herein,*

Of what Things annexed to the Freehold, Waste may be committed.

(A) In what Subjects in general Waste may be committed.

(D) What shall be deemed Waste with respect to ecclesiastical Persons.

(E) What Waste shall be deemed excusable.

(F) What Waste shall be justifiable, by Reason of the Interest of the Party.

(G) Who may bring an Action of Waste.

(H) Against whom the Action of Waste may be brought: Herein,

1. *Against whom it may be brought for Waste done by a Stranger.*

2. *How far it lies against Executors, &c.*

(I) At what Time an Action of Waste shall be brought.

(K) Of the Process and Proceedings in Actions of Waste: And herein,

1. *In what Cases the Action shall be brought in the* Tenet.

2. *In what Cases it shall be brought in the* Tenuit.

(L) Of the Pleadings in Actions of Waste.

(M) Of the Judgment in Actions of Waste, and what shall be recovered thereby.

(N) In what Cases in general Waste may be restrained by Injunction in Equity: And herein,

How far it may be restrained in Equity, notwithstanding the Words without Impeachment of Waste *be contained in the Lease, &c.*

(O) What Relief may be given in Equity in Cases of Waste.

(A) In what Subjects in general Waste may be committed.

THE statute 52 H. 3, c. 23, § 2, *enacts, that farmers,*(*a*) *during their terms, shall not make waste,*(*b*) *sale,*(*c*) *nor exile of house, woods, and men.*

This act provideth remedy for waste done by lessee for life, or lessee for years, and it is the first statute that gave remedy in those cases: for the rule of the register is, that there are five manner of writs for waste, viz., two at the common law, as for waste done by tenant in dower, or by the guardian; and three by statute or special law, as against tenant for life, tenant for years, and tenant by the curtesy. 2 Inst. 145, [299. But this opinion of Lord Coke, that there was no remedy at common law for waste, except against tenant by the curtesy in dower, and a guardian, it should seem, is not well founded. Vide Bract. lib. 4, c. 18; 2 Reeves's Hist. Law, 73, 74, 148, note.]—— This statute is a penal law, and yet because it is a remedial law it has been interpreted by equity. *Arg.* 10 Mod. 281, in case of Hammond v. Webb.——(*a*) Here farmers do comprehend all such as hold by lease for life or lives, or for years, by deed or without deed. 2 Inst. 145.——It has been resolved likewise that it should extend to strangers. *Arg.* 10 Mod. 281, in case of Hammond v. Webb.——Although the register says *sciend.* that *per statutum de Marlebridge, cap.* 23, *data fuit quædam prohibitio vasti versus tenentem annorum*, which is true; yet the statute extends to farmers for life also, but this act extended not to tenant by the curtesy, for he is not a farmer; but if a lease be made for life or years, he is a farmer, though no rent be reserved. 2 Inst. 145.—— (*b*) By these words they are prohibited to *suffer* waste, for it has been resolved that this act extends to waste *omittendo*, though the word is *faciant*, which literally imports *active* waste. *Arg.* 10 Mod. 281, in case of Hammond v. Webb. [(*c*) *Note*, the word *sale* is not in the original act. Bracton, speaking of the terms *waste, destruction, and exile*, says, that the two first signified the same thing; but *exilium* meant something of a more enormous nature; as spoiling or selling houses; prostrating and extirpating trees in an orchard or avenue, or about any house; all these were considered, says he, *ad maximam deformitatem a curiæ et capitalis messuagii*, and as they either drove the inhabitants away, or had a tendency so to do, they were called *exilium*. Bract. lib. 4, c. 18, § 13; 1 Reeves's Hist. Law, 386.]

Nor of any thing(*d*) *belonging to the tenements that they have to farm.*

(*d*) Houses, woods, and men were before particularly named, and these words do comprehend lands and meadows belonging to the farm. 2 Inst. 146.——Also these general words have a further signification; and, therefore, if there had been a farmer for life or years of a manor, and a tenancy had escheated, this tenancy so escheated did

(C) What Acts shall be deemed Waste.

belong to the tenements that he held in farm, and therefore this extended to it; and the lessor shall have a writ generally, and suppose a lease made of the lands escheated by the lessor, and maintain it by the special matter. 2 Inst. 146.

Unless they have special license(a) by writing of covenant, mentioning that they may do it.

(a) This grant ought to be by deed, for all waste tends to the disinheritance of the lessor, and therefore no man can claim to be dispunishable of waste without deed. 2 Inst. 146.——Likewise this special grant is intended to be *absque impeditione vasti*, without impeachment of waste. 2 Inst. 146.

Which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously.

And this must be understood in such a prohibition of waste upon this statute as lay against a tenant in dower at the common law, and single damages were given by this statute against lessee for life, and lessee for years. 2 Inst. 146.

But waste may be committed not only in houses and lands, but in gardens, orchards, timber-trees, dove-houses, warrens, parks, fish-ponds, and other subjects of property, as will be shown.

1 Inst. 53 a.

(B) Of the several Kinds of Waste.

THERE are two kinds of waste, viz., *voluntary* or *actual*, and *negligent* or *permissive*. *Voluntary* waste may be done by pulling down or prostrating houses, or cutting down timber-trees: *Negligent* waste may be by suffering houses to be uncovered, whereby the spars or rafters, planches or other timber of the house are rotten.

1 Inst. 53 a.

A leased a house which was ruinous at the time of the demise: the lessee obliged himself not to do or suffer any voluntary waste, &c.: the house fell, and A brought debt: it was adjudged, that it lies; for it is waste, though the lessee may excuse himself upon the special matter.

Dy. 38, pl. 35; Ow. 92, Glover v. Pipe, and a difference was taken between an action of waste, and debt on an obligation.

So, where A leased a house and land for years by indenture, in which was a *clause that if the lessee* happens to *do any waste*, the *lessor may re-enter*. The *lessee suffered the house to fall for want of covering* and repairing. Though the words were (to do any waste), yet Dyer and Walsh inclined that lessor might re-enter, because such waste is punishable by the statute of Gloucester, and the words (any waste) is general and indifferent to either of the two kinds of *waste, viz., voluntary or negligent*, &c.

Dy. 281, pl. 21. Of this opinion likewise is Lord Coke in his comment on the statute of Marlebridge, where he says, That to do or make waste, in legal understanding, includes negligent as well as voluntary waste. 2 Inst. 145. ‖It has been held an action on the case does not lie for mere permissive waste against a tenant at will, who has not covenanted to repair. Gibson v. Wells, 1 New R. 290; nor against tenant for years. Herne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392; *sed* vide 2 Saund. 252, n. 7, *cont.*, and see 3 Co. R. 25, note (A), (ed. Fraser.)‖

(C) What Acts shall be deemed Waste.

IT has been laid down as a general principle, that the law will not allow that to be waste, which is not any way prejudicial to the inheritance.

Het. 35, Barret v. Barret.

Nevertheless, it has been held, that a lessee or tenant cannot change the

nature of the thing demised; though in some cases the alteration may be for the greater profit of the lessor. Thus,—

If a lessee converts a corn-mill into a fulling-mill, it is waste, although the conversion be for the lessor's advantage.

Cro. Ja. 182, Civit. London v. Greyme.

Also, converting a brewhouse of 120*l.* *per annum* into other houses let for 200*l.* a year, is waste, because of the alteration of the nature of the thing, and of the evidence.

1 Lev. 309, Cole v. Green.

‖ But where the jury, in an action for waste, against a tenant for years, in converting three closes of meadow into garden ground, gave only one farthing damages for each close, the court gave the defendant leave to enter up judgment for himself, on the ground that the reversion could not be considered as injured, and *de minimis non curat lex.*

The Governors, &c., of Harrow School v. Alderton, 2 Bos. & Pul. 86; and see 1 Bing. 382; 1 Jac. & Walk. 651.‖

We will now consider what shall be deemed *waste* with respect to particular subjects of property. And,

1. *What Acts shall be deemed Waste in Lands.*

If the tenant converts arable into wood, or *è converso*, it is waste; for it not only changes the course of husbandry, but also the proof of evidence.

Hobart's Rep. Case, 296, p. 234.

But if a lessee suffers arable land to lie fresh, and not manured, so that the land grows full of thorns, &c., this is not waste, but ill husbandry.

2 Roll. Abr. 814.

Likewise, the conversion of meadow into arable is waste, for it not only changes the course of husbandry, but the proof of his evidence.

1 Inst. 53 b.

But if meadow be sometimes arable, and sometimes meadow, and sometimes pasture, there the ploughing of it is not waste.

2 Roll. Abr. 815. Some say, that ploughing must be prohibited by covenant to pay so much an acre, for that an absolute restraint from ploughing is void.

Neither is the division of a great meadow into many parcels, by the making of ditches, waste; for the *meadows* may be better for it, and it is for the profit and ease of the occupiers.

2 Ley, 174, pl. 210.

Likewise, converting a meadow into a hop garden, is not waste; for it is employed to a greater profit, and it may be meadow again. *Per* Windham and Rhodes, J.; but Periam, J., said, though it be a greater profit, yet it is also with greater labour and charges.

2 Ley, 174, pl. 210.

But converting a meadow into an orchard is waste, though it be to the greater profit of the occupier. *Per* Periam.

2 Ley, 174, pl. 210. ‖See 2 Bos. & Pul. 86.‖

If a lessee plough the land stored with conies, this is not waste; unless it be a warren by charter or prescription.

2 Roll. Abr. 815.

So, if a lessee of land destroys the coney-boroughs in the land, it not

being a free warren by charter or prescription, it seems it is not waste; for a man can have no property in them, but only a possession.

Ley, 174, pl. 210; Ow. 66, Moyle v. Moyle.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea the meadow or marsh is surrounded, whereby the same becomes unprofitable. But if it be surrounded suddenly by the rage and violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is not waste. Yet, if the tenant repair not the banks or walls against rivers or other waters, whereby the meadows or marshes be surrounded and become rushy and unprofitable, this is waste.

1 Inst. 53 b.

So, *à fortiori*, if arable land be surrounded by such default; for the surrounding washes the marl and other manurance from the land.

2 Roll. Abr. 816.

2. *What Acts shall be deemed Waste in Trees and Woods.*

Trees are parcel of the inheritance, and therefore if lessee assigneth his term, and excepts the timber trees, it is void; for he cannot except that which doth not belong to him by law.

5 Rep. 12, Saunders's case.

The lessor, after he has made a lease for life or years, may by deed grant the trees, or reasonable estovers out of them, to another and his heirs; and the same shall take effect after the death of the lessee. But such a gift to a stranger is void during the estate for life, because of the particular prejudice which might be done to the lessee.

11 Rep. 48, Liford's case.

The lessee hath but a particular interest in the trees, but the general interest of the trees doth remain in the lessor: for the lessee shall have the waste and fruit of the trees, and the shadow for his cattle, &c., but the interest of the body of the tree is in the lessor, as parcel of his inheritance.

11 Rep. 48, Liford's case.

Therefore, if trees are overthrown, by the lessee or any other, or by wind or tempest, or by any other means disjointed from the inheritance, the lessor shall have them in respect of his general ownership.

11 Rep. 81, Bowles's case.

{Waste can be committed only of the thing demised. If, therefore, the trees are excepted out of the demise, no waste can be committed by cutting them down.

8 East, 190, Goodright v. Vivian.}

With respect to timber trees, such as oak, ash, and elm, (which are timber trees in all places,) waste may be committed in them, either by cutting them down, or topping them, or doing any act whereby the timber may decay. Also, in countries where timber is scant, and beeches or the like are converted to building for the habitation of man, they are also accounted timber.

1 Inst. 53 a, 54 b.

Thus, waste may by committed in the cutting of beeches in Buckinghamshire, because there, by the custom of the country, they are the best timber.

2 Roll. Abr. 814; ‖Aubrey v. Fisher, 10 East, 446; Wright v. Powle, Gwill. Tyth. Ca. 357.‖

So, waste may be committed in the cutting of birches in Berkshire, because they are the principal trees there for the most part.

2 Roll. Abr. 814.

If the tenant cut down timber trees, or such as are accounted timber, as is aforesaid, this is waste; and if he suffer the young germins to be destroyed, this is destruction. So it is, if the tenant cut down underwood, (as he may by law,) yet, if he suffer the young germins to be destroyed, or, if he stub up the same, this is destruction.

1 Inst. 53 a.

If a lessee or his servant suffer a wood to be open, by which beasts enter and eat the germins, though they grow again, yet it is waste; for after such eating they never will be great trees, but shrubs.

2 Roll. Abr. 815.

If a termor cuts down underwood of hazel, willows, maple, or oak, which is seasonable, it is not waste.

2 Roll. Abr. 817. If usually cut and sold every ten years, it is no waste; but if he dig them up by the roots, or suffer the germins to be bitten with cattle after they are felled, so as they will not grow again, the same is a destruction of the inheritance, and waste lies for it. And mowing the stocks with a wood scythe is a malicious waste; and continual mowing and biting is destruction. Godb. 210, pl. 298, Sir John Gage v. Smith.

If ashes are seasonable wood to cut from ten years to ten years, it is not waste to cut them down for house-bote.

2 Roll. Abr. 817.

But, if the ashes are gross of the age of nine years, and able for great timber, it is waste to cut them down.

2 Roll. Abr. 817.

If oaks are seasonable, and have been used to be cut always at the age of twenty years, it is not waste to cut them down at such age, or under; for in some countries, where there is great plenty, oaks of such age are but seasonable wood.

2 Roll. Abr. 817.

But after the age of twenty years, oaks cannot be said to be wood seasonable, and therefore it shall be waste to cut them down.

2 Roll. Abr. 817.

Cutting down willows, beech, birch, asp, maple, or the like, standing in the defence and safeguard of the house, is destruction. If there be a quickset fence of white thorn, if the tenant stub it up, or suffer it to be destroyed, this is also destruction. And for all these and the like destructions, an action of waste lieth.

1 Inst. 53 a.

The cutting of horn-beams, hazels, willows, sallows, though of forty years' growth, is no waste, because these trees would never be timber. *Per* Meade, J.

Godb. 4, pl. 6.

β Selling or otherwise using timber unnecessarily is waste.

Brashear v. Macey, 3 J. J. Marsh. 93.

In Massachusetts, to cut oak trees for firewood, where such is the common practice, is not waste.

Padelford v. Padelford, 7 Pick. 152.

But it is waste to cut timber trees and exchange them for firewood.

7 Pick. 152. See Elliott v. Smith, 2 N. H. Rep. 430.

(C) What Acts shall be deemed Waste.

Tenant for life may cut down timber trees for the purpose of making necessary repairs to the estate, and he may sell them and purchase boards with the proceeds for such repairs, and this is no waste; provided this be the most economical way of making such repairs.

Loomis v. Wilbur, 5 Mason, 13.

Where wild and uncultivated lands, wholly covered with wood and timber, is leased, the lessee may fell a part of the wood and timber, to render the land fit for cultivation, without being liable for waste; but he cannot cut down such timber to the permanent injury of the inheritance.

Jackson d. Church v. Brownson, 7 Johns. 227.g

If the lessee covenant, that he will leave the wood at the end of the term as he found it; if the lessee cut down the trees, the lessor shall presently have an action of covenant: for it is not possible for him to leave the trees at the end of the term. So that the impossibility of performing the covenant shall give a present action on a future covenant. But it is otherwise in the case of a house; for there, though the lessee commit waste, yet he may repair the waste done, before the term expires.

7 Rep. 15, Englefield's case; 5 Rep. 21, Mayne's case.

The *cutting of trees* is justifiable *for house-bote, hay-bote, plough-bote, and fire-bote.*

1 Inst. 53 b; Hobart's R. C. 296; Bro. *Waste*, 130. By the common law the lessee shall have them, though the deed does not express it; but if he *takes more than is necessary*, he shall be punished in waste. Bro. *Waste*, pl. 130.——A termor may take wood for them, because they belong to him of common right. F. N. B. 59, (N). And ibid. in the new notes there (*i*) says, he may take oaks, elms, ash, &c., for repairs of the house, and underwood, &c., for enclosures and firing.——Covenant by lessor, that lessee shall have house-bote, hay-bote, and fire-bote, without committing any waste, on pain of forfeiting the lease, is no more than what the law appoints, and therefore the *covenant* is vain. Bro. Eliz. 604, pl. 18, Archdeacon v. Jennor.——If lessee *justifies*, in waste, for *cutting oaks for fire-bote, he must surmise that there was no underwood upon the land;* so, it seems, where he takes ash, or other trees, which are timber. Bro. *Waste*, pl. 89. And by the best opinion, *oak and ash under the age of sixteen years* may be cut for fire-bote. Ibid.——*Lessee for life or years*, by the common law, cannot take fuel but of *bushes and small wood*, and not of timber trees: *but if lessor in the lease grants fire-bote expressly*, then if lessee cannot have sufficient fuel as above, &c., he may take great trees. 3 Le. 16, Anon.

The tenant may take *sufficient wood to repair the walls, pales, fences, hedges, and ditches as he found them;* but he cannot make new.

1 Inst. 53 b. In an action of waste for cutting trees, the defendant justifies, &c., that they were *to make a fence with pale.* And by Hobard, it was good, *without showing that the fence was made of pale, &c., and now in decay.* Noy, 23, Jenkins v. Jenkins. ‖ Whether trees were cut down for the sake of repairs or not, is a question for a jury. Doe dem. Foley v. Wilson; 11 East, 56.‖

Cutting dead wood is no waste.

1 Inst. 53.

But converting trees into coals for fuel, where there is sufficient dead wood, is waste.

1 Inst. 53.

β Tenant for life in right of his wife of land and slaves, with remainder in fee to one-sixth of the land after her death, cleared out wood-land in the centre of the tract, not leaving sufficient timber to repair the place. Held, that if there was open land sufficient for the employment of the

wife's slaves, when the husband got possession, the clearing by him was waste.

Adm'rs of Johnson v. Ex'rs of Johnson, 2 Hill. 296.

Where the tenant of the demised premises had agreed not to cut down, destroy, or carry away, any more wood or timber than should actually be used and employed on the farm, and that he would not make any manner of waste, sale or destruction of the wood or timber; it is waste for him to cut down and use wood growing on the demised premises to burn bricks for sale.

Livingston v. Reynolds, 26 Wend. 115.

It is not waste to use wood for the common purposes of the estate; as, where land is annexed to a furnace, cutting wood for it is no waste.

Den v. Kenney, 2 South. 552.

Digging away the green sward on the banks of a river, and cutting down the trees growing there, so as to expose it to be washed by the river, is waste.

Scutton v. Trenton Delaware Falls Company, Sax. Ch. R. 694.

In an action of dower, the court allowed a rule to stay waste against persons who were cutting down wood on the land out of which dower was demandable.

Harker v. Christy, 2 South. 717.

3. *What shall be deemed Waste, in digging for Gravel, Mines, &c.*

If the tenant digs for gravel, lime, clay, brick-earth, or stone hid in the ground, or for mines of metal or coal, or the like, not being open at the time of the lease, it is waste.

1 Inst. 53 b. But not where it is for reparation. See *post*, 5, *What shall be deemed waste with respect to houses.*

If a man hath land in which there is a mine of coals, or the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the lessee for such mines as were open at the time of the lease made may dig and take the profits thereof; but he cannot dig for any new mine that was not open at the time of the lease made, for that would be adjudged waste.

1 Inst. 54 b.

Likewise, if there be open mines in the land, and the owner lease it to another *with the mines in it*, he may dig in the open mines, but not in the close mines: but otherwise it would be, if there was not any open mine there; for then the lessee might dig for mines, otherwise the grant would take no effect.

1 Inst. 54 b.

If a lessee dig slate stone out of the land, it is waste.

2 Roll. Abr. 816.

And, digging for stones, unless in an ancient quarry, is waste, though the lessee fill it up again.

Ow. 66, Moyle v. Moyle.

Likewise, if he have a lease of land, in which there was a coal-mine, but not open at the time of the lease; if the lessee open it, and assign his interest, it is still waste in the assignee. But, where the lease is of lands, and all mines in it, there the lessee may dig in it.

5 Rep. 12 a, b, Sander's case.

But, if lessee of land, with mines of coals, iron, and stone, digs of the coals, iron, and stones, so much as is necessary for him to use without selling, it is not waste.

2 Roll. Abr. 816.

If a lessee digs the earth, and carries it out of the land, action of waste lies.

2 Roll. Abr. 816.

If a lessee digs for gravel or clay, for reparation of the house, not being open at the time of the lease, it is not waste; any more than the cutting of trees for reparation.

1 Inst. 53 b.

βA tenant in dower of coal lands may take out coal to any extent from a mine already opened, or sink new shafts into the same vein.

Cronch v. Puryear, 1 Rand. 258.

Tenant for lives renewable for ever of lands with bog, cannot cut the turf for sale.

Bouchier v. O'Grady, 2 Moll. 536.

But where a bog has been demised as a bog, or all the land demised is bog, and only valuable as such, the tenant may use it as he pleases.

Anon., 1 Hogan, 147.

The tenant cannot dig turf under a demise of "improvable bog," unless he can show it was necessary to cut away the turf for the purpose of improving it.

Pollard v. Smith, 1 Hogan, 391.

Injunction refused to restrain tenant from cutting turf as fire-bote.

Count de Salis v. ——, 2 Moll. 516.ℊ

4. *What shall be deemed Waste in Gardens, Orchards, Fish-ponds, Dove-houses, Parks, &c.*

If the tenant cut down or destroy any fruit trees, growing in the garden or orchard, it is waste: but if such trees grow upon any of the ground which the tenant holdeth out of the garden or orchard, it is no waste.

1 Inst. 3 a.

Breaking a hedge also is not waste.

1 Inst. 3 a.

Likewise, destruction of *saffron heads in a garden*, is not waste.

Bro. *Waste*, pl. 143, cites 10 H. 7, c. 2.

‖ But ploughing up strawberry beds by an outgoing tenant has been held to be waste.

Watherall v. Howells, 1 Camp. R. 227.‖

βA tenant at will not allowed to break up an ancient meadow or pasture, though the land is mossy and requires tillage.

Martin v. Coggan, 1 Hogan, 120.

But it is not waste to plough up land held under lease, if the land was not ancient meadow or pasture at the date of such lease.

Morris v. Morris, 1 Hogan, 238.ℊ

If the tenant of a dove-house, warren, park, vivary, estangues, or such

like, takes so many, that so much store is not left as he found at the time of the demise, it is waste.

1 Inst. 53 a; Hob. R. C. 296.

Likewise, if the lessee of a pigeon-house stops the holes, that the pigeons cannot build, it is waste.

1 Inst. 53 a.

So likewise, suffering the pales of a park to decay, whereby the deer are dispersed, is waste.

1 Inst. 53 a.

Also, if the lessee of a hop-ground plough it up and sow grain there, it is waste.

Ow. 66, Moyle v. Moyle.

The *breaking of a wear* is waste, and so of the *banks of a fish-pond*, so that the water and fish run out.

Ow. 66, Moyle v. Moyle.

5. *What shall be deemed Waste with respect to Houses.*

Waste may be done in houses, by pulling them down or prostrating them, or by suffering the same to be uncovered, whereby the spars or rafters, planches or other timber of the house, are rotten.

1 Inst. 53 a.

Default of coverture of a house is waste, though the timber be standing.

2 Roll. Abr. 815.

But, if the house be uncovered, when the tenant cometh in, it is no waste in the tenant to suffer the same to fall down.

1 Inst. 53 a.

Though there be no timber growing upon the ground, yet the tenant at his peril must keep the houses from wasting.

1 Inst. 53 a.

If a lessee razes the house, and builds a new house, if it be not so long and wide as the other, it is waste.

2 Roll. Abr. 815. But if the old house falls by being ruinous, and the lessee builds a new one, it needs not be so long and wide as the old one. Bro. *Waste*, pl. 93.

So, if he rebuilds it more large than it was before, it is waste; for it will be more charge for the lessor to repair it.

1 Inst. 53 a.

β It is not waste for a tenant to erect a new edifice upon the demised premises, provided it can be done without materially injuring the buildings or other improvements already on the premises.

Windship v. Pitt, 3 Paige, 259.γ

‖ Where a lease contained a *proviso* for re-entry, if the lessee committed waste to the value of 10*s*., and the lessor brought ejectment on this proviso, because the tenant had pulled down some old buildings of more than 10*s*. value, and erected others of a different description, it was held that the waste mentioned in the proviso was waste producing an injury to the reversion to the value of 10*s*.; and therefore it was a question for the jury, whether such waste to that value had been committed.

Doe v. Bond, 5 Barn. & C. 855.‖

(C) What Acts shall be deemed Waste.

But, if a lessee of land makes a new house upon the land where there was not any before, this is not waste; for it is for the benefit of the lessor.

2 Roll. Abr. 815.

But, according to Lord Coke, if the tenant build a new house, it is waste; and if he suffer it to be wasted, it is a new waste. Yet, if the house be prostrated by enemies or the like without a default of the tenant, or were ruinous at his coming in, and fall down, the tenant may build the same again with such materials as remain, and with the other timber, which he may take growing on the ground for his habitation; but he must not make the house larger than it was.

Inst. 53 a. Lord Coke, perhaps, is here to be understood of building a new house in the room of one of which was before on the premises; and thus Rolle and he may be reconciled.

If the house be uncovered by tempest, the tenant must in convenient time repair it.

1 Inst. 53 a.

If a lessee fling down a wall between a parlour and a chamber, by which he makes a parlour more large, it is waste; because it cannot be intended for the benefit of the lessor, nor is it in the power of the lessee to transpose the house.

2 Roll. Abr. 815. ‖See Young v. Spencer, 9 Barn. & C. 145.‖

So, if he pull down a partition between chamber and chamber, it is waste.

Bro. *Waste*, 143.

Or, if a lessee pull down a hall or parlour, and make a stable of it, it is waste.

2 Roll. Abr. 815.

If a lessee pull down a garret over-head, and make it all one and the same thing, it is waste.

2 Roll. Abr. 815.

If a lessee permit a chamber *fore in decasu pro defectu plaustrationis, per quod grossum maheremium devenit putridum, et camera illa turpissima et fœdissima devenit*, action of waste lies for it.

2 Roll. Abr. 815.

So, if a lessee permit the walls to be in decay for default of daubing, *per quod maheremium devenit putridum*, action of waste lies.

2 Roll. Abr. 815.

The breaking of a pale or of a wall uncovered is not waste.

Bro. *Waste*, pl. 94.

But the *breaking of a wall covered with thatch, and of a pale of timber covered*, is waste.

Bro. *Waste*, pl. 94.

Burning the house by negligence or mischance is waste.

Inst. 53 b. But by the 6 Ann. c. 31, no action is to be prosecuted against any person in whose house or chamber any fire accidentally begins.

If the tenant do or suffer waste to be done in houses, yet, if he repair them before any action brought, there lieth no action of waste against him; but he cannot plead, *quod non fecit vastum*, but the special matter.

1 Inst. 53 a.

(C) What Acts shall be deemed Waste. (*Removable Fixtures.*)

6. *Of what things annexed to the Freehold Waste may be committed.*

The removing of a post in a house is waste.

42 E. 3, 6. Of posts, &c., fixed in the land, and not to the walls by termor, and taken off within his term, waste does not lie, for the house is not impaired by it. *Per* Kingsmill, J., and Grevill, Serjt. *Quod non negatur.* Bro. *Waste*, pl. 104.

So, the removing of a door.

42 E. 3, 6; 1 Inst. 53. In waste of taking away doors, the lessee pleaded that he erected them, and the court took a difference between outer doors and inner doors. *Per* three Js. Lessee may take away the inner doors within the term, but not the outer doors. Moo. 177, pl. 315, Cooke's case, *alias* Cook v. Humphrey.

So, the removing of a window.

42 E. 3, 6. It is waste, though the glass window be glazed by the tenant himself. 1 Inst. 53 a.

The digging up a furnace annexed to the franktenement, and selling it, is waste.

Bro. *Waste*, pl. 143. So, though annexed by the tenant himself. 1 Inst. 53 a. The difference is between a furnace fixed to the middle or to the wall of the house: in the first case the lessee may take it away, but not in the last. *Per* Dyer and Owen, Js., Ow. 71, in case of Day v. Austin.——A furnace fixed *in medio domûs* is but a chattel, and removable; but otherwise, if fixed to the walls. *Per* Walmsley. Said to have been agreed in Dyer's time. Cro. Eliz. in case of Day v. Bisbich. So of a dyer's vat fixed to the walls, adjudged not removable on an attachment. Cro. Eliz. 374, pl. 24, Day v. Bisbich.

The removing of a bench is waste, though annexed by the tenant himself.

Bro. *Waste*, pl. 143; 1 Inst. 53 a.

If wainscot annexed to the house be taken away, it is waste.

Bro. *Waste*, pl. 143; 1 Inst. 153 a. Though annexed by the tenant himself. Id. ibid. If fixed to a wall, it is waste. *Per* Anderson, Cro. Eliz. 374, in case of Day v. Bisbich. Wainscot annexed by the lessor or lessee, is parcel of the house, and whether by great or little nails, screws, or irons, put through the post or walls of the house, is all one; but if by any way whatever it be fixed to the post or walls of the house, it is waste for lessee to remove them; and shall pass by grant of the house in the same manner as the ceiling and plastering; 4 Rep. 64, cites it as resolved, Mich. 41 & 42 Eliz. C. B. by the whole court, in case of Warner v. Fleetwood. But *per* Dodderidge, J., wainscot may as well be removed by a lessee as arras hangings. Roll. 216, in Bridgman's case.

Of tables dormant and fixed in the land, and not to the walls by termor, and taken off within his term, waste does not lie; for the house is not impaired by it. *Per* Kingsmill, J., and Grevill, Serjt.

Bro. *Waste*, pl. 104. Tables dormant fixed cannot be removed, and if they are, it is waste. *Per* Anderson, C. J., Cro. 374, pl. 24, E., in case of Day v. Bisbich.

Beating down a wooden wall, or suffering a brick wall to fall, is no waste, unless it be expressly alleged that the walls were coped or covered.

Dyer, 108 b, pl. 31, Earl of Bedford v. Smith. So of a mud wall, is waste. Bro. *Waste*, pl. 143.

If waste be assigned in pulling up a plank floor and mangers of a stable, plaintiff must show that the same were fixed.

Dyer, 108 b, pl. 31.

If lessee erects a partition, he cannot break it down without being liable to an action of waste, for he has joined it to the franktenement.

Mo. 178, Cooke's case.

Shelves are parcel of the house, and not to be taken away; and though

it is not showed that the shelves were fixed, it ought to be intended that they were fixed. *Per* Coke, C. J.

Cro. Eliz. 329, Pyot v. Lady St. John; 2 Bulstr. 113.

Pavement is a structure, for they use lime to finish it.

Cro. Eliz. 329, Pyot v. Lady St. John; 2 Bulstr. 113. And held, that it is within the intention of the covenant for repairing edifices, buildings, and it is *quasi* building.

If the tenant suffers the groundsels to waste in his default of defence or removing the water from off them, or of dirt or dung or other nuisance which lies or hangs upon them, the tenant shall be charged, for he is bound to keep them in as good case as he took them.

Ow. 43, Stickleborne v. Hatchman. If by not scouring a ditch or moat, the groundsels of the house are putrified, waste shall be assigned *in domibus pro non scourando.* Id. ibid.

[The rule which seems pretty clearly established by the above cases, that whatever is annexed to the freehold becomes part of it, and cannot be removed without doing waste, has been relaxed in later times, upon motives of public policy, as between two descriptions of persons, that is, landlord and tenant, and tenant for life or in tail, and the remainder-man or reversioner. As between landlord and tenant, it is now admitted, that the latter may, *during the term*, take away all such chimney-pieces, wainscot, &c., and all such things necessary for trade, as brewing vessels, coppers, fire-engines, cider-mills, &c., as he has himself put up or erected. We have said *during the term*, for if he remove them *after the term*, he will be a trespasser.(*a*) And as between tenant for life or in tail, and the remainder-man or reversioner, it is also admitted, that the former may remove fire-engines, cider-mills, coppers, &c., which he has erected, and thereby not only enjoys the profits of the estate, but likewise carries on a species of trade. And if he does not remove them in his lifetime, they go to his personal representatives. But as between *heir* and *executor*, the old rule of law seems still to hold; for though in an action of trover by an executor against an heir for a cider-mill, tried at Worcester before Lord C. B. Comyns, his lordship was of opinion, that it was personal estate, and directed the jury to find for the executor; yet Lord Mansfield has observed, that that case in all probability turned upon a custom: and that where no circumstance of that kind arises, the rule shall still hold in favour of the heir, seems fully established by the decision of the Court of King's Bench in Lawton v. Lawton, Easter, 22 G. 3.

β Van Ness v. Packard, 2 Pet. R. 143; g Ex parte Quincy, 1 Atk. 477; Lord Dudley v. Ld. Ward, Ambl. 113; Bull. N. P. 34, S. P.; Poole's case, 1 Salk. 368; Lawton v. Lawton, 3 Atk. 13; {1 H. Black. 258, Fitzherbert v. Shaw; Ibid. 259. n., Lawton v. Salmon; 3 Esp. Rep. 11, Dean v. Allalley; 2 East, 88, Penton v. Robert; 4 Esp. Rep. 33, S. C.;} ‖Lawton v. Salmon, 1 H. Black. 259, notes; Penton v. Robart, 2 East, 88. (*a*) See Fitzherbert v. Shaw, 1 H. Black. 258.‖ Vide 3 Atk. 16, by Sanders, note.]

{And the relaxation of the old rule in favour of tenants extends only to erections *for the purposes of trade.* A tenant of a farm cannot remove buildings annexed to the freehold, which he has erected for the ordinary purposes of *husbandry*, and the better enjoyment of the profits of the land, though he thereby leaves the premises in the same state as when he entered.

3 East, 28, Elwes v. Maw. Vide Dean v. Allalley and Penton v. Robart, *ubi supra.*}

‖ In the leading cases above, (in 3 Atk. 13, Amb. 113, and 1 H. Black. 259,) the courts may be considered as having decided mainly on the

ground, that where the fixed instrument, engine, or utensil (and a building covering the same falls within the same principle) was an accessory to a matter of a personal nature, that it should be considered as personalty. Lord Hardwicke says, in the case in Ambler, "A colliery is not only an enjoyment of the estate, *but in part carrying on a trade.*" And in 3 Atk. he says, "One reason that weighs with me, is its being a mixed case between enjoying the profits of the lands, and carrying on *a species of trade;* and considering it in this light, it comes very near the instances, in brew-houses, &c., of furnaces and coppers." Upon the same principle, Lord C. B. Comyns may be considered as having decided the case of the cider-mill, *i. e.* as a mixed case, between enjoying the profits of the land and carrying on *a species of trade*, that of making cider. But the case of buildings for trade has always been put as a known allowed exception from the general rule, and the courts will not extend the exception to buildings erected for mere purposes of agriculture. Accordingly where a tenant in agriculture had erected at his own expense, and for the more convenient occupation of his farm, a beast-house, carpenter's shop, fuel-house, pump-houses, and fold-yard wall, of brick and mortar, and let into the ground, it was held, that he could not remove them even during the term; though he thereby left the premises in the same state as when he entered.

Elwes v. Maw, 3 East, 38. See the learned and elaborate judgment of Lord Ellenborough.

Where the tenant erected a building (with permission of the landlord) on a brick foundation let into the ground, with a chimney belonging to it, and with a wooden superstructure brought from another place where the tenant had carried on business, and the building was used for the purpose of making varnish, it was held removable. The building here came within the exception in favour of trade. Though Lord Kenyon in his judgment hinted that gardeners and nursery men might remove greenhouses and hothouses, yet this *dictum* has been questioned by Lord Ellenborough, 3 East, 38, and by Dallas, C. J., 2 Bro. & B. 58; but it seems that a nurseryman by *trade* may clearly sell young trees raised on the demised land, though it seems otherwise as to a farmer rearing trees to fill up the demised orchards.

Penton v. Robart, 2 East, R. 88. See *per* Heath, J., Windham v. Way, 4 Taunt. 316.

With respect to ornamental fixtures, as chimney-pieces, wainscots, &c., which are removable, (vide *suprà*,) these are also exceptions to the general rule, and therefore to be fairly considered, but not to be extended: and accordingly in a late case it was held, that a tenant could not remove a conservatory erected by him on a brick foundation and attached to the demised dwelling-house, and communicating with it by windows opening into the conservatory, and a flue passing into the parlour chimney; since the building had become part of the freehold.

Buckland v. Butterfield, 2 Bro. & Bing. 54; 4 Moo. R. 440; and see Farrant v. Thompson, 5 Barn. & A. 826.

And though the building is used for the purposes of trade, still if the tenant expressly covenants to deliver up all buildings erected during the term he cannot remove it.

Naylor v. Collinge, 1 Taunt. 19; and see Thresher v. East London Water-Works, 2 Barn. & Cres. 608.‖

(D) What shall be deemed Waste with respect to ecclesiastical Persons.

With respect to ecclesiastical persons, it has been held, that an action on the case will lie for dilapidations.

3 Lev. 268, Jones v. Hill.

And it has been said that dilapidation of ecclesiastical places, houses, and buildings, is a good cause of deprivation.

3 Inst. 204.

If a bishop cut and sell(*a*) the trees of the bishopric, *for this waste a prohibition shall be granted, commanding him to cease doing such waste.* Resolved in parliament.

11 Rep. 49, cites as the Bishop of Durham's case; ‖see *infrà*. (*a*) But it seems he may sell, and apply the money in repairs. Amb. 176; 3 Meriv. 428.‖

So, if a parson or vicar waste the trees of his parsonage or vicarage, a prohibition shall be granted; for it is the dowry of the church.

11 Rep. 49, Liford's case. The patron may have the prohibition. ‖See Barn. C. R. 399; 2 Atk. 217; Amb. 176; 2 Bro. C. C. 552, *acc.*‖

So, if a prebendary waste the trees of his prebend, the patron may have a prohibition. Between Ackland and Atwell, prohibition granted by the Lord Coventry, Lord Keeper, for the prebend of Catton in Devon.(*b*)

‖(*b*) See this case, 2 Roll. Abr. 813; 3 Swanst. 499, *notâ*.‖

It has been holden, that if a bishop, parson, or other *ecclesiastical person cut down trees* upon the lands, *unless* it be *for reparation* of their ecclesiastical houses, and do or suffer to be done any dilapidations, they may be punished for the same in the Ecclesiastical Court, and a prohibition will not lie in the case: and that the same *is a good cause of deprivation* of them of their ecclesiastical livings and dignities. But, yet, for such waste done, *they may be also punished by the common law*, if the party will sue there.

Godb. 259, pl. 357, Salisbury Bishop's case.

On a motion for prohibition, the suggestion appeared to be, that the parson had *digged and found lead mines in his glebe, and had felled timber;* and it was insisted that this was waste, and prohibitable by 35 E. 1, *De non prosternend. arbores, &c.* But *per cur.*—It lies not for mines; for then mines in glebe-land can never be opened.

Lev. 107, Countess of Rutland's case.

‖An uninterested stranger cannot obtain a writ of prohibition to restrain a bishop from committing waste in the possessions of his see; and it seems that the bishop can only be restrained by a proceeding at suit of the crown or of the metropolitan. So also as to deans and chapters.

Jefferson v. Bishop of Durham, 1 Bos. & Pul. 105; and see tit *Prohibition* (A), Vol. viii. Wither v. Dean and Chapter of Winchester, 3 Meriv. 421; Herring v. Dean and Chapter of St. Paul's, 3 Swanst. 492; and see note, Ibid.‖

(E) What Waste shall be deemed excusable.

It may be observed in general, that waste which ensues from the act of God is excusable.

1 Inst. 53 a.

Thus, if a house falls by tempest, the tenant shall be excused in action of waste.

But, if it be *uncovered by tempest, and stand* there, if the *tenant has sufficient time to repair it*, and does not, the lessor, if the lease be made on condition of re-entry for waste, may re-enter, but not immediately upon the tempest; for it is no waste till the tenant

(F) What Waste justifiable, by Interest of the Party.

suffers it to be so long unrepaired, that the timber be rotted; *per* Hull, and then it is waste. Bro. *Conditions*, pl. 40.——If he *suffer it to continue unrepaired, so that at last the house is cast down by a tempest*, it is waste; Mo. 62, pl. 173.

Likewise, if a house be abated by lightning, or thrown down by a great wind, it is not waste.

Inst. 53 a.

So, if apple trees be torn up by a great wind, if lessee afterwards cut them, it is not waste.

Bro. *Waste*, pl. 39; 2 Roll. Abr. 820, *contrà;* 20 H. 6, c. 1 b; β Shult v. Barker, 12 S. & R. 272.β

If the banks be well repaired by the lessee, and the water notwithstanding subvert them, and surround his meadow, by which it is become rushy, it is not waste.

Lessee for years *covenanted* upon a penalty of 10*l. to repair the banks of a river.* They were afterwards broken down by a *sudden outrageous flood.* Fitzherbert and Shelly held, that he is excused the penalty, because it is the act of God; but he is bound by his covenant to repair it, which he must do in convenient time. Dyer, 33 a, pl. 10, 11.——If banks *on the river Trent* are *unrepaired*, it is waste; *per* all the justices; because the Trent is not so violent, but that the lessee by his policy and industry may well enough preserve the banks, and make the water to run within its bounds; but the violence of the sea is such, that it cannot be restrained by any policy; and, therefore, it is no waste if that by tempestuousness breaks the walls and surrounds the land. Mo. 69, pl. 187, Griffith's case.

The lessor cannot give trees during the tenant's lease. But if he grants them to a stranger, and commands the tenant to cut and deliver them, who does it, this shall excuse him in an action of waste. And yet the tenant was not bound by law to obey and execute this command.

Bro. *Done*, &c., pl. 13.

(F) What Waste shall be deemed justifiable, by reason of the Interest of the Party.

Tenant in tail may commit waste in houses as well as in all other parts of the estate, notwithstanding any restraint to the contrary, and no instance can be shown where a tenant in tail has been restrained from committing waste by injunction of the Court of Chancery.

Cas. temp. Talb. 16, Glenorchy v. Bosville. And his lordship said, an injunction was refused, in Mr. Saville's case of Yorkshire, who being an infant, and tenant in tail in possession, and in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber, just before his death, to a very great value; the remainder-man applied here for an injunction to restrain him, but could not prevail. Ibid.

If *tenant in tail* grants all his estate, *his grantee* is dispunishable of waste; so, such *grantee's grantee* is also dispunishable. *Per* Clerk, J.

3 Le. 121, pl. 173, Anon.

If a man *devises land to two in tail*, and after the *one* devisee *dies without issue*, by which the reversion in fee of one moiety reverts to the heir of the donor, but the *other* devisee is tenant for life of the whole, and after he *commits waste;* action of waste lies against him by the heir of the donor for the one *moiety.*

Lands were given to A and B, and the heirs of *their two bodies.* A *died without issue*, and the remainder of the half *reverted* to the donor. He brought waste against B, of houses and lands to him demised, and agreed that the writ was good: but it was questioned, if the count shall be general, or of a half only, notwithstanding that both were tenants in common of the reversion. 2 Brownl. 133, Mallet v. Mallet.

But action of waste does not lie against *tenant in tail after possibility,*

(F) What Waste justifiable, by Interest of the Party.

for the greatness of the estate of inheritance which was once in him; and also, as some say, because the estate was *not within the statute at the creation.*

11 Rep. 80 a, Lewis v. Bowles. But such tenant shall not have the trees, &c., which he cuts. 4 Rep. 63, Herlakenden's case.——And such tenant may be restrained in equity. See *post.*

If lands are given to the husband and wife, and to the heirs of the body of the husband, the remainder to the husband and wife, and to the heirs of their two bodies begotten; and the husband dies without issue; the wife shall not be tenant in tail after possibility; for the remainder in special tail was utterly void, for that it could never take effect. For so long as the husband should have issue, it should inherit by force of the general tail; and if the husband die without issue, then the special tail cannot take effect, inasmuch as the issue which should inherit in special tail must be begotten by the husband; and so the general, which is larger, and greater, hath frustrated the special, which is less; and the wife, in that case, shall be punished for waste.

1 Inst. 28 b.

It has been agreed, that *tenant for years may cut wood;* but it has been doubted, if *tenant at will may:* but it seems, that as long as tenant at will is not countermanded he may cut seasonable wood, &c.

Bro. *Waste,* pl. 114. Tenant at will cannot justify cutting underwood without license. *Per* Littleton, Bro. *Waste,* pl. 131.

Where a man *leases a wood which consists only of great trees,* the lessee cannot cut them.

Bro. *Waste,* pl. 126.

But a lessee may justify the *cutting of trees for reparation of houses.*

Hobart's Rep. Case, 296; 1 Inst. 54 b. But in such case the termor shall *pay the wages and salary of the workmen out of his own money,* and not cut wood to sell, to pay the wages. Bro. *Waste,* pl. 112.—And if he cut trees for reparations, and *suffers the trees to lie and putrify,* it is waste. Ibid. ‖Whether trees were cut down *bonâ fide* for the sake of repairs is a question for a jury. Doe v. Wilson, 11 East, 56.‖

Nevertheless, *if lessee cuts trees for reparation, and sells them, and after buys them again, and employs them for reparation,* it is waste by the sale.

1 Inst. 53 b.

So, if lessee *cuts trees, and sells them* for money, *though with the money he repairs the house,* yet it is waste.

1 Inst. 53 b. ‖Gower v. Eyre, Coop. Chan. Ca. 156, but it seems otherwise as to ecclesiastical persons. Amb. 176; 3 Meriv. 428.‖

As to the cutting of timber trees for repairs by lessee, there is no *difference* whether the *lessor or lessee covenants to repair* the houses; for in either case it is not waste if lessee cuts them.

Mo. 23, pl. 80, Anon. *If lessor covenants to repair* the houses and does not, lessee may cut down trees for the repairing of the houses. Brownl. 240, Anon.

If a *house be prostrated by enemies of the king,* or such like *without default of the lessee,* the lessee may rebuild it with the same materials that remain, and may *cut other timber* upon the land to rebuild it, but he must not make the house larger than it was.

1 Inst. 53 a. If *strangers, enemies of the king,* destroy a house, waste does not lie; but *contrà,* if it be *by traitorous subjects* of the king. Bro. *Waste,* pl. 15.

So, if the house *was ruinous at the time of the lease, and fell within the term,* this is not waste in the tenant.

2 Inst. 53 a; Bro. *Waste,* pl. 130.

(F) What Waste justifiable, by Interest of the Party.

But the lessee shall *not* cut trees to make *a new house where there was not any at the time of the lease.*

Hobart's Rep. Case, 296.

So, if a lessee *suffers a house to fall for default of covering*, which is waste, he *cannot cut trees to repair the house.*

Bro. *Waste*, pl. 39.

And in general, if the *tenant suffer the house to be wasted*, he cannot justify the felling of timber to repair it.

1 Inst. 53 b. And in such case the felling of timber to repair the same is double waste. Ibid.

If a *house be ruinous at the time of the lease, though the lessee is not bound to repair it*, yet he *may cut trees to repair it.*

1 Inst. 54 b. If the tenant *covenants to repair such ruinous houses*, he may take trees for it. Bro. *Waste*, pl. 130, cites 12 H. 8, 1.

The tenant likewise may *dig for gravel or clay for reparation of the house*, though the soil was not open when the tenant came in; and it is justifiable as well as the cutting of trees.

1 Inst. 53 b.

So, with regard to *a stable, if it fall without default of the lessee in the time of the lessor*, the lessee *may take trees in the time of the heir to make a new stable, if it be of necessity.*

Bro. *Waste*, pl. 67.

But, if the stable falls *in default of the lessee*, in time of the lessor, he cannot in time of the heir cut trees to make a new stable.

Bro. *Waste*, pl. 67. Issue was taken whether it was well repaired in the time of the plaintiff (the heir) and fell in the time of the plaintiff, in default of the defendant

Cutting *wood to burn, where the tenant has sufficient hedgewood*, is waste

F. N. B. 59, (M).

Where lessee for years has power to take hedge-bote *by assignment*, yet he may take it without assignment; for the affirmative does not take away the power which the law gives him.

Dy. 19, pl. 115, Anon.

If *lessor except his trees* in his lease, the lessee shall not have fire-bote, hay-bote, &c., which he should have otherwise: and the property of the trees is in the lessor himself.

4 Le. 162, pl. 269, Sir Richard Lewkner's case. Upon such reservation waste will not lie against the tenant for cutting trees, because they are not parcel of the thing leased, but trespass lies in such case. Dy. 19, pl. 110; ‖Goodright v. Vivian, 8 East, 190.‖

Yet it has been said, that *lessee for years, the trees being excepted*, has liberty to take the *shrowds and loppings* for fire-bote; but if *he cuts any tree*, it shall be *waste, as well for the lopping as for the body* of the tree.

Noy. 29, Rich v. Makepeace.

If a tenant that has fire-bote to his house *in another man's land*, cuts wood for that intent to take his bote-wood, and *the owner* of the land *takes it away*, an action of trover and conversion lies against him by the tenant of the land who hath such fire-bote.

Clayt. 40, pl. 99, *coram* Barkley, Anon.

If the *lessor is bound in a bond of* 100*l.*, and the *lessee cuts twenty oaks, and sells them, and pays the obligee* for his lessor, yet waste lies

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against him for cutting them down, though the money was applied to the use and profit of the lessor.

Dy. 36 b, pl. 38, Maleverer v. Spinke.

If A hath common of estovers in the wood of B for house-bote, and he cuts down four trees for that purpose, and *in the working they prove unfit* for the use, as for posts of a house, &c., A *cannot convert* this timber to *any other use*, &c., neither can he sell and buy other fit wood with the money; and he cannot enlarge the house with this timber, nor board the sides of the barn there which had mud walls or the like before.

Clayt. 47, pl. 81, *coram* Barkley, Earl of Pembroke's case.

Where a rent is granted in fee, with a *proviso to enter and retain till satisfied of the profits;* the grantee, upon entry, cannot cut trees, or do waste. *Per* three justices.

1 Lev. 171, Jemmet v. Cooley.

Cutting *dead wood* is no waste.

F. N. B. 59, (M).

If a man leases land with general words of *all mines of coals, where there is not any mine of coals open at the time of the demise, and after the lessee opens a mine*, he cannot justify *the cutting of timber trees for the making of puncheons, corses, rolls, roll-scoops, and other utensils*, in and about the said mine, though without them he could not dig and get the coals out of the mine: and this is like to a *new house built after the demise*, for the reparation of which he cannot take timber upon the land; and it had been waste to open it, if it had not been granted by express words: And it was said by Hobart, that the law had been the same if the mine was open at the time of the demise.

Hobart's Rep. C. 296, Ld. Darcey v. Ashwith; and see Hutt. 19, where the case is more clearly reported.

βA tenant in dower may clear woodland assigned to her in dower, without being guilty of waste, if she does not exceed the relative proportion of cleared land considered as to the whole tract.

Hastings v. Cruncketon, 3 Yeates, 261.g

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By 13 Edw. 1, c. 22, *the action of waste is given to one tenant in common against* another.(a)

13 Ed. 1, c. 22. (a) These words include as well joint-tenants as tenants in common, for both of them hold *in communi;* and so do old books and records term them both. But though the generality of these words do extend to coparceners, yet in good construction they are not within the purview of this act, because they were compellable to make partition; for this act extends not to them that had remedy by the common law.

{One tenant in common cannot maintain an action on the case in nature of waste against another tenant in common in possession of the whole, having a demise from the first of his moiety, for cutting down trees of a proper age and growth for being cut.

8 Term, 145, Martyn v. Knowllys.}

Where there are tenants in common for life, the one shall not have trespass of trees cut against the other, but shall have waste *pro indiviso*, though they are only tenants for term of life, &c.: but the one may have trespass of corn cut against the other.

Bro. *Waste*, pl. 79.

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||Where one of two tenants in common demised to the other his moiety of the lands, of which they were jointly seised, and the tenant in common, lessee, cut down timber of a proper age and growth for being cut; it was held that the other tenant in common could not maintain an action for waste against him, since the tenant cutting the timber could not be in a worse situation than if the plaintiff had not demised to him. In another form of action the plaintiff might be entitled to recover a moiety of the value of the trees.

Martin v. Knowlys, 8 Term R. 145. As to injunctions for waste against one tenant in common, see *post*, (N).||

If one coparcener before partition makes feoffment to another, and one of them does waste in the trees, waste lies.

11 Rep. 49 a, Liford's case.

Likewise, if two joint-tenants do waste, and after the *one enters into religion*, waste lies against the other alone.

2 Roll. Abr. 828.

By the 20 Ed. 1, st. 2, *an action of waste is maintainable by the heir for waste done in the time of his ancestors, as well as for the waste done in his own time.*

13 E. 1, st. 2. It is questioned if this is not an ordinance only. See Maynard's Ed. 2, 231, 273, 274.

This action must be brought by him that hath the immediate estate and inheritance in fee-simple or fee-tail, but sometimes another may join with him.

1 Inst. 53 b, 285 a.

It is said, that the reversion must continue in the same state that it was at the time of the waste done, and not granted over; for though the reversioner taketh the estate back again, the action is gone, because the estate did not continue. But in some special cases an action of waste shall lie, though the lessor had nothing in the reversion at the time of the waste done; for if a bishop makes a lease for life or years, and dies, and the lessee, the see being void, doth waste, the successor shall have an action of waste. This is allowed upon a particular reason. A purchaser shall have an action of waste, though the statute of 20 Ed. 1, speaks of those that are inheritors.

1 Inst. 53 b, 356; 2 Roll. Abr. 825.

A tenant for life cannot have this action, but a parson, &c., may have an action of waste, and the writ shall say, *ad exhæredationem ecclesiæ*, for it is the dowry of the church. If a tenant doth waste, and he in reversion dieth, the heir shall not have an action of waste, for waste done in the life of his ancestor: for he cannot say that the waste was done to his disinherison; neither shall a bishop, master of an hospital, parson, &c., have an action of waste done in the time of their predecessors.

1 Inst. 341 a; 1 Inst. 53 b, 356 a.

If a lease is made to A for life, remainder to B for life, remainder to C in fee; no action of waste lieth against the first lessee during the estate in the mesne remainder,(*a*) for then his estate would be destroyed. Otherwise, if B had a mesne remainder for years, for that would be no impediment, the recovery not destroying the term of years.

5 Rep. 67, 77; 1 Inst. 54. (*a*) [But in such case court of equity would interpose by injunction to present waste. Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, Ibid. 210; Farrant v. Lovell, Ibid. 723;] {6 Ves. J. 787, Davies v. Leo.}

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If lessee for years committeth waste, and the years expire, yet the lessor shall have an action of waste for the treble damages, though he cannot recover the place wasted: but, if the lessor accepteth of a surrender of a lease after the waste done, he shall not have his action of waste. It is said, that if a tenant repairs before action brought, he in reversion cannot have an action of waste; but he cannot plead that he did no waste, therefore he must plead the special matter.

1 Inst. 285 a, 283 a; 2 Inst. 306; 5 Rep. 119; 2 Cro. 658.

Likewise, by 11 H. 6, c. 5, where tenants for life, or for another's life, or for years, grant over their estates, and take the profits to their own use, and commit waste, they in reversion may have an action of waste against them.

And so it is of mesne assignees; the action lies against him that takes the profits; but this is by the statute of 11 H. 6, c. 5. For in that case the pernor of the profits did not hold the land. 2 Inst. 302.——If *tenant for life or years does waste, and grants over* his estate, the writ lies against him who did the waste, and not against the grantee. F. N. B. 56, (A). But if the waste be done after the alienation made, then it lies against the tenant. F. N. B. 60, (L); but says, *tamen quære.*

He in the remainder as well as the reversion may bring this action, and every assignee of the first lessee, mediate or immediate, is within this act.

5 Rep. 77, Paget's case; 2 Inst. 302.

βA remainder-man for life only cannot sue for waste; the plaintiff must be entitled to the inheritance; a contingent interest is not sufficient.

Mayo v. Feaster, 2 M'Cord, Ch. 142.

A mortgagee of a reversion of an estate in dower, who enters after condition broken, may maintain an action against the tenant for life, for waste committed before his entry.

Fay v. Brewer, 3 Pick. 203.

A reversioner may sue a stranger for waste done to the reversionary estate, while in the possession of the tenant.

Randall v. Cleaveland, 6 Conn. 328.

An action on the case in the nature of waste can be brought only by a reversioner, or remainder-man in fee-simple, for tail, for life, or for years.

M'Laughlin v. Long, 5 Har. & J. 113.ℊ

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It has been said, that there are five writs of waste, two at the common law, as for waste done by tenant in dower, or by guardian; three by statute, as against tenant for life, tenant for years, and tenant by the curtesy. It has been said, however, that tenant by the curtesy was punishable for waste by the common law, for that the law created his estate as well as that of the tenant in dower, and therefore the law gives like remedy against them.

1 Inst. 54 a; 2 Inst. 145, 299, 301, 305.

But on this subject the authorities in the books are very contradictory, as the reader will perceive by attending to the note subjoined to the foling clause of—

The *statute of Gloucester*, 6 E. 1, cap. 5, which enacts that *a man from henceforth shall have a writ of waste*(*a*) *in the Chancery against him*(*b*) *that holds by law of England.*(*c*)

No action of waste *lay before the statute of Gloucester, but against tenant in dower and*

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guardian, and *by the statute, action* of waste is *given against tenant by the curtesy for term of life*, and tenant for term of *years*. Bro. *Waste*, pl. 68.——Lord Coke says, a reason is required, (that seeing as well the estate of the *tenant by the curtesy*, as the *tenant in dower*, are created by act in law,) wherefore the prohibition of waste did not lie as well against the tenant by curtesy as the tenant in dower at the common law; and the reason he assigns is this, for that *by having issue the state of the tenant by the curtesy is originally created*, and yet after that *he shall do homage alone* in the life of his wife, which proves a larger estate; and seeing that at the creation of his estate he might do waste, the prohibition of waste lay not against him after his wife's decease; but in the case of tenant in dower, she is punishable of waste at the first creation of her estate. 2 Inst. 145.——But 2 Inst. 299, says, that at the common law waste was punishable in three persons, (viz.,) tenant in dower, tenant by the curtesy, and the guardian, but not against tenant for life, or tenant for years; and the reason of the diversity was, for that the law created their estates and interest; and therefore the law gave remedy against them, but tenant for life and for years came in by demise and lease of the owner of the land, &c., and therefore he might in his demise provide against the doing of waste by his lessee; and if he did not, it was his negligence and default.——(*a*) Neither this act, nor the statute of Marlebridge, doth create *new kind of wastes*, but gives new remedies for old wastes; and what is waste, and what not, must be determined by the common law. 2 Inst. 300, 301. β The statute of Gloucester, 6 Ed. 1, c. 5, is in force in Massachusetts so far as to give an action against the tenant for life for the recovery of the place wasted, and treble damages; except in respect to tenants in dower, respecting which the law has been altered by statute. Sackett v. Sackett, 8 Pick. 309.g——(*b*) If two are *joint-tenants* for years or for life, and one of them does waste, this is the waste of them both as to the place wasted, notwithstanding the words of the act are (him that holds). 2 Inst. 302.——(*c*) Here tenant by the curtesy is named for two causes. *1st*, For that albeit the common opinion was that an action of waste did lie against him, yet some doubted of the same in respect of this word (*tenet*) in the writ, for that the tenant by the curtesy did not hold of the heir, but of the lord paramount; and after this act, the writ of waste grounded thereupon doth recite this statute. *2dly*, For that greater penalties were inflicted by this act than were at the common law. 2 Inst. 301.

Or (*a*) *otherwise for term of life, or for term of years, or a woman* (*b*) *in dower.*

(*a*) A lessee *for his own life*, or *for another man's life*, is within the words and meaning of this law, and in this point this act introduces that which was not at the common law. 2 Inst. 501. [In this point, with deference to the high authority of Lord Coke, the act does not introduce that which was not at the common law; for tenant for life was punishable for waste at common law, as may be seen in Bracton, lib. 4, c. 18.]——If *feme lessee for life takes husband*, the *husband does waste*, the *wife dies*, the *husband shall not be punished* by this law; for the words of this act be, (a man that holds, &c., for life,) and the husband held not for life; for he was seised but in right of his wife, and the estate was in his wife. 2 Inst. 301.——He that hath an *estate for life by conveyance at common law, or* by *limitation of use*, is a tenant within the statute. 2 Inst. 302.——Tenants *for years of a moiety*, 3d or 4th part, *pro indiviso*, are within this act; and so it is of a tenant by the *curtesy, or* other tenant *for life of a moiety, &c.* 2 Inst. 302.——(*b*) This is to be understood of all the five kinds of dowers whereof Littleton speaks, viz., dower *at common law*, dower *by the custom*, dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la pluis beale;* and against all these the action of waste did lie at the common law. 2 Inst. 303.——If tenant *in dower* be *of* a *manor*, and a *copyholder* thereof *commits waste*, an action of waste lies against tenant in dower. 2 Inst. 303.

Action of waste lies against an *occupant for life*, because he has the estate of the lessee for life, and holds for life, as the *statute* mentions.

6 Rep. 37 b, Dean and Chapter of Worcester.

If *lessee for life* be *attainted of treason*, by which the lease is forfeited to the *king*, who *grants it over to J S, and he afterwards do waste*, though he come in *en le post*, yet action of waste lies against him.

2 Roll. Abr. 826.

So, if a man *disseise the tenant for life, and do waste*, yet action of

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waste lies against the tenant for term of life; for *he may have his remedy over against the disseisor.*

Bro. *Waste*, pl. 138.

βNeither a devisee of an estate-tail, nor of a contingent fee with an executory devise over, has any power to waste or destroy the inheritance.

Wallington v. Taylor, Sax. Ch. R. 314.ℊ

Likewise, if an estate be made *to A and his heirs, during the life of B*, A die, *the heir of A shall be punished* in an action of waste.

1 Inst. 54 a, (s).

But an action of waste does not lie against *tenant by statute merchant, elegit, or staple*, because it is not an estate for life or years, and the statute mentions those who hold in any manner for life or years. *Contrà* Fitzh. Na. 58, H., and there said, that in the register is a writ against him.

δ Rep. 37, Dean and Chapter of Worcester; F. N. B. 58, (H), and in the new notes there (*a*) cites 21 E. 3, 26, that a *scire facias* was brought against a tenant *by elegit*, who had cut trees *to pay the residue of the money to answer for the trees cut*, and for the plaintiff *to have his land again; per curiam.* By the statute against cutting trees, this is in the nature of a trespass, and lies not in account, nor is he punishable in waste, but in an *action on the case.*—Waste lies not against tenant by *elegit*, but *writ of account.* Bro. *Waste*, pl. 78.

Some books give *the reason of it to be*, because the conusor, if he commits waste, may have a *venire facias ad computandum*, and the waste shall be recovered in the debt.

Fitz. Na. 58 b, (H). If such tenant cuts timber *it sinks the debt*, and the conusor may have *scire facias ad computandum*, 3 Mod. 93, *Arg.* in the case of the mayor and commonalty of Norwich v. Johnson.

If a man makes a *lease for years*, and *puts out the lessee*, and *makes a lease for life*, and the *lessee for years enters upon the lessee for life, and does waste*, the lessee for life shall not be punished for it.

2 Inst. 303.

If *lessee for years* makes a *lease of one moiety to A*, and of the *other moiety to B*, and A does waste; the action shall be against both; for the waste of the one is the waste of the other.

Brownl. 238, Anon.

An action of waste lies against *a devisee*, and the writ may suppose it *ex legatione;* for it is within the equity of the *statute.*

Bro. *Waste*, pl. 132.

No action of waste lies against *guardian in socage*, but an account or trespass.

1 Inst. 54, S. P. *contrà* F. N. B. 59, (E), and 2 Inst. 135, says, the heir within age shall have an action of waste against the guardian in socage.—But F. N. B. 59 (E), in the new notes there,(*d*) it is said, that *the heir* in this case shall have account or trespass, but not waste.—And Ibid. (A), in the new notes there (*d*). Note, waste does not lie against the guardian in socage, but only account or trespass, according to the nature of the waste, and says it was adjudged 16 E. 3.——If *guardian in socage in right of his wife* does waste, the writ shall be against the husband only. Brownl. 239.

If an estate of lands be made to baron and feme, to hold to them during the coverture, &c., if they waste, the feoffor shall have writ of waste against them.

Litt. sect. 381.

If *feme lessee for life marries, and the husband does waste*, action lies against both.

2 Roll. Abr. 827.

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And, if in the above case, the husband *dies*, action of waste lies against the feme for the waste he committed.

2 Roll. Abr. 827

But if *tenant in dower marries, and the husband does waste and dies*, the feme shall not be punished for this.

2 Roll. Abr. 827.

Likewise, if *baron and feme are lessees for life*, and *baron does waste, and dies*, the feme shall be punished in waste, *if she agrees to the estate.*

2 Roll. Abr. 827; 1 Inst. 54; Kelw. 113, pl. 42.—Though there have been variety of opinions in our books. She shall be punished by the waste done by her husband in like manner as if a stranger had done it; and after the death of her husband she is in from the lessor. 2 Inst. 303.——The feme shall not be punished for this waste; *per* Hanke. Bro. *Waste*, pl. 58; Bro. *Waste*, pl. 138, says, that waste does not lie against the feme. But says, *quære*, If this be not the waste of both; and says, so see where there is folly in the feme, and where not. [*Quære*, If this does not mean by her agreeing to the estate after the baron's death.]

But if she waives the estate, she shall not be charged.

2 Roll. Abr. 827.

So, upon lease for years made to the baron and feme, waste lies against both.

2 Roll. Abr. 827.

And, if *baron and feme are joint lessees for years*, and *baron does waste, and dies*, action of waste lies for this against the feme.

2 Roll. Abr. 827.

Upon lease *for life* to baron and feme, waste lies against both.

Roll. Abr. 827.

Likewise, if *feme commits waste and then marries*, the action shall be brought against both.

2 Roll. Abr. 827. And the writ may be *quod fecerunt vastum*, or *quod uxor, dum sola fuit, fecit vastum*. Bro. *Waste*, pl. 55.

If *baron, seised for life of his wife in right of his wife, does waste*, and after the *feme dies*, no action of waste lies against the baron *in the tenuit*, because he was seised only in right of his wife, and the franktenement was in the feme.

1 Inst. 54; 5 Rep. 75 b, resolved *per tot. cur.*, Clifton's case, that the writ does not lie; and the reporter says, *Nota* reader, This judgment given upon consideration of the statute of Gloucester, and of opinions *obiter in* 10 H. 6, 11 & 12, by Strange and Cottesmore; S. C. cited by Treby, C. J., Lutw. 674, Baron v. Barkley; and said the reason is, because it cannot be said that the baron *tenuit ex dimissione*, according to the words of the statute.

But if baron, *possessed for years* in right of the feme, does waste, and after the feme dies, action of waste lies against the baron, because the law gives the term to him.

1 Inst. 54.

A made a *feoffment* in fee *to the use of himself and his wife*, and to *his heirs;* there were *underwoods* on the lands, which were *usually cut at twenty-one years'* growth; *A suffered them to grow twenty-five years, and then died. Per tot. cur.*—This shall bind the wife; for where the law limits a time for tenant for life to fell underwood, if it be not felled in that time, it shall not be felled by a tenant for life afterwards, but it shall be waste.

Godb. 4, 5, pl. 6, Anon.

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Lessee for years of lands *bought trees, with liberty to cut them down within eighty years:* afterwards the *lessee bought the inheritance, and devised to his wife for life*, remainder *to the plaintiff in fee*, and *made his wife executrix*, and died: she cut down the trees: adjudged, that an action was maintainable; for though the trees were once chattels in the lessee, yet by purchasing the inheritance they are again united to the land.

Ow. 49, Anon.

If the king *commits the wardship* of the heir in ward unto another, and the *committee does waste*, then, upon a surmise made thereof in Chancery, the king shall send a writ unto the escheator to go to the land and see if waste be done, and to certify the king thereof in the Chancery.

F. N. B. 59, (B).

If *escheators* commit waste in lands which they have in their hands in custody, the heir within age, or of full age, shall have an action of waste, and shall recover treble damages against them, and they shall suffer imprisonment two years at the least, at the king's pleasure. And so if escheators *commit waste in* other *lands, seised into the king's hands by inquest of office.*

F. N. B. 59, (B).

And escheators, or other guardians of lands, *in the vacation of the temporalities of bishoprics*, shall do no waste, &c.

F. N. B. 59, (B).

Pending a *quare impedit*, if the incumbent cuts trees upon the glebe, and upon the lands of copyholders of a manor, parcel of the rectory, a prohibition lies.

Hob. 36, pl. 51, Drury v. Kent.

A prohibition is awardable *against any one who wastes the houses of the parson incumbent, or cuts the trees, or does any waste.* Agreed by all the justices.

Mod. 917, pl. 1303, Saccar's case. The *prohibition of waste* was *abrogated, and the action of waste framed* upon the act of Westm. 2, (c. 14,) as in the register appears. 2 Inst. 146.

If tenant by the curtesy, or other *tenant for life, make a lease for years*, and he in the *reversion confirm it*, and tenant by the curtesy die, an action of waste lies against the lessee.

2 Inst. 302.

But if tenant by the curtesy grant over his estate, and the grantee commit waste, the action of waste ought to be brought against the tenant by the curtesy by the heir, and thereby he shall recover the land against the assignee, for the *privity*, which is between the heir and the tenant by the curtesy.

1 Inst. 54; Le. 291, pl. 397, S. P.; 2 Inst. 301.

So, if *tenant in dower grant over* her estate, and after the grantee commit waste, yet an action of waste lies againt the tenant in dower, for the *privity* between them.

2 Roll. Abr. 828; 2 Inst. 301.—S. P. 3 Rep. 23 b, in Walker's case. The reason wherefore, at the common law, the action of waste did lie against the tenant in dower, or tenant by the curtesy, albeit they had assigned over their estates, was, *because no action of waste, by the common law, lay against the assignee for waste done after the assignment;* therefore the action of necessity did, for such waste, (after the assignment,) lie against the tenant by the curtesy, or tenant in dower. 2 Inst. 300.——And it lies

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against her, and not against the grantee, for the grantee cannot be tenant in dower; and *confirmation by the heir to the tenant in dower is no bar in this action;* because it shall not change her estate. Bro. *Waste*, pl. 76.——Where the *husband levied a fine, and took back an estate for life, remainder to his son in tail, and died; and the son endowed the mother, who assigned over* the estate; it was nevertheless adjudged, that waste lay against her as tenant in dower. F. N. B. 55, (E), in the new notes there (*a*).

But if tenant by the curtesy, or tenant in dower, grant over their estate, and grantee do waste, and the heir, either before or after the assignment, grant the reversion over, the stranger *shall have* action of *waste against the assignee*, because the privity is destroyed.

1 Inst. 54.—S. P. 3 Rep. 23 b, in Walker's case.—F. N. B. 56, (E), S. P. For one cannot hold by the curtesy, but of the heir, &c.—He can hold of none but the heir, and his heir by descent. 1 Inst. 316 a.—*But if feoffee of the baron endow the feme*, and she assign over the estate, waste lies for him against the wife; for the plaintiff shall not suppose in his writ, that she held in dower of him *ex assignatione*, but only that she held in dower of his heritage. F. N. B, 56, (E), in the new notes there (*a*).

If *lessee for life grant over* his estate *upon condition*, and after the *grantee commit waste*, and *grantor enter for the condition broken*, he cannot be charged for the waste committed by the grantee.

1 Inst. 54. The action shall be brought against the grantee. And so it is in case of tenant for years. 2 Inst. 302.—And the place wasted shall be recovered. 1 Inst. 54a.

So, if lessee for life *make feoffment upon condition*, and the feoffee commit waste, and after the lessee re-enter for the condition broken, an action of waste does not lie against him for the waste committed by the feoffee.

2 Roll. Abr. 828; *contrà*, 39 Ass. 15, by Tank.

If *tenant for life without impeachment of waste lease for years*, or otherwise, and lessee for years commit waste, he in remainder in fee shall not have an action of waste; for this lease was derived out of the privileged estate for life; and if waste lay, it should be brought against the tenant for life, who made the lease, and he was dispunishable.

Sir W. Jo. 51, pl. 2, Bray v. Tracy.

If there be *lessee for life*, remainder *in tail*, remainder *in fee to the lessee*, and he do waste, he in remainder in tail shall have an action of waste.

2 Roll. Abr. 828.

If lessee for life and for years commit waste, and die, his executor shall not be charged for it.

2 Roll. Abr. 828, *contrà*, 46 E. 3, 31 b, admitted; Bro. *Waste*, pl. 48. β A tenant for life is liable for waste committed by a trespasser. Fay v. Brewer, 3 Pick. 203; White v. Wagner, 4 Har. & J., 373.g

But a *condition in a lease not to do waste, extends to the assignee*, without naming him, and that as inherent to the land.

Clayt. Rep. 126, 127, pl. 125, Ward v. Waddington.

If lessee for 100 years *grant part of his term to another*, and he commit waste, the action shall be brought against the first lessee.

Brownl. 238, Anon. β An action on the case, in the nature of waste, lies against the assignees of a lessee. Short v. Wilson, 13 Johns. 33.g

Lessee for years made a *lease of one moiety to A*, and of the other *moiety* to B.—A does waste—the action shall be against both; for the waste of the one is the waste of the other.

Brownl. 238, Anon.

B, lessee for years, the reversion to A in fee: B assigned all his term and

interest to J S, reserving all trees growing and being on the lands, and afterwards he committed waste in cutting down the trees; A brought an action against J S, and it was disputed whether the action would lie. It seemed agreed, that if the reservation was good, then the action would lie against the assignee; but to prove it void, it was insisted, that what a man cannot grant he cannot reserve; so that because the lessee cannot grant the trees he cannot reserve them. As to the point of law the court was divided.

Goldsb. 63, pl. 23, Foster's case. If tenant for years or for life assigns over his lease for years, or estate for life, excepting the timber trees, and after waste is done in felling down the trees, the action of waste is maintainable against the assignee, for as to the lessor they are not severed from the land. 2 Inst. 302.

But the action of waste does not lie against *tenant at will.*

Bro. *Waste*, pl. 52, who says, that case lies, but not waste.—If *tenant at will* to him and his heirs, *according to the custom, or another tenant at will cuts trees*, action of *waste does not lie, but trespass. Per* Ascough, J., which was not denied by the other justices, but it is not expressed whether he shall have trespass *vi et armis*. Bro. *Trespass*, pl. 147.—Tenant at will cut down trees, lessor brought trespass *vi et armis* against him, and held good, and judgment accordingly. 4 Le. 167, pl. 271, Walgrave v. Somerset.—Because otherwise he shall have no action, for waste is not maintainable; 1 Inst. 57 a. It lies not against tenant at will *for permissive waste*, either *by common law or by statute. Arg.* Show. 315, Cunlip v. Rundle. {An action on the case does not lie against him for *permissive* waste. 4 Bos. & Pul. 290, Gibson v. Wells.} ‖See Gibson v. Wells, 1 New R. 290; Harne v. Benbow, 4 Taunt. 764; Jones v. Hill, 7 Taunt. 392; *sed* vide 2 Saund. 252, n. 7, *contrà*.‖

Nor, according to some, against *lessee for a year*,(*a*) though the statute mentions years.

2 Roll. Abr. 828, *contrà*, 48 E. 3, 25. It lies against lessee for a year, and so from year to year. Bro. *Waste*, pl. 52. (*a*) S. P., or for half a year. 2 Inst. 302. And so though he holds only for twenty weeks. Plow. C. 467.

‖ An action on the case, in nature of waste, lies against the tenant for acts done after the expiration of a notice to quit.

Burchell v. Hornsby, 1 Camp. 360.

β A mortgagee in possession may be charged with, and made to account for waste.

Rawlings v. Stewart, 1 Bland, 22.β

1. *Against whom it may be brought for Waste done by a Stranger.*

If a stranger commits waste, yet an action of waste lies against the lessee, for in a trespass he shall recover his damages against the stranger.

49 E. 3, 26 b. The statute of Marlebridge prohibits farmers doing waste, and yet if they suffer a stranger to do waste, they shall be charged with it; for it is presumed in law, that the farmer may withstand it, *et qui non obstat quod obstare potest, facere videtur*. ‖Attersoll v. Stevens, 1 Taunt. 196.‖ 2dly, The law does give to every man his proper action, so as none be without due remedy; and therefore, in this case, the lessor shall have his action of waste against the lessee, and the lessee his action of trespass against him that did the waste; and so the loss, as reason requires, in the end shall be upon the wrong-doer; and if the lessor should not have this action of waste, he should be without remedy. 2 Inst. 145, 146.

So, if a stranger disseises lessee and commits waste, waste lies against lessee for this, for he shall have his remedy against the stranger.

44 E. 3, 27 b. And the lessor cannot, in such case, have trespass against the disseisor. Bro. *Waste*, pl. 37, cites S. C.

If a man, who has common of estovers of land in lease, does waste in cutting such wood as he ought not, action of waste lies against lessee for it;

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for it seems he may have trespass against commoner, for he is as a mere stranger for this.

46 E. 3, 27 b.

A guardian shall not be punished in waste for waste done by a stranger.

F. N. B. 60.

If lessee for life leases for years, and lessee for years does waste, waste lies against lessee for life.

49 E. 3, 26 b.

Tenant by the curtesy and tenant in dower shall be punished for waste done by a stranger.

1 Inst. 54 a. For he in the reversion cannot have any remedy but against the tenant, and the tenant shall have his remedy but against the wrong-doer, and recover all in damages against him; for voluntary waste and permissive waste is all one to him that hath the inheritance. But, if the waste be done by the enemies of the king, the tenant shall not answer for the waste done by them, for the tenant has no remedy over against them. 2 Inst. 303.

If two are joint-tenants of a ward, and the one does waste, both shall be punished in an action of waste.

1 Inst. 54 a; 2 Inst. 305, cites 3 E. 3, 18. So of waste done by one, both shall be attainted for it. See 2 Inst. 303.

‖If there are two joint-tenants for life or years, and one of them commits waste, this is deemed waste by both as to the place wasted; but treble damages shall be recovered only against the person who actually committed the waste.

2 Inst. 302, Cru. Dig. tit. xviii. c. 1, § 63; Co. Lit. 54 a.‖

An infant shall be punished in an action of waste for waste done by a stranger.

1 Inst. 54 a.

Baron and feme shall likewise be punished in waste for waste done by a stranger.

1 Inst. 54 a. If an infant is tenant by the curtesy or lessee for life or years, he shall answer for the waste done by a stranger, and have his remedy over; though some have holden the contrary. And so it is in case of a feme covert; for the privilege of coverture and infancy, in this case, shall not prevail against the wrong and disherison done to him that has the inheritance, especially when they have their remedy over, and the estate is of their own purchase or taking. 2 Inst. 303.

If baron, possessed of a lease for years in right of his feme, commits waste, and after the feme dies, action of waste lies against the baron, because the law gives the term to the baron.

1 Inst. 54 a.

If thieves burn the house of tenant for life without any default of lessee for life in keeping his fire, the lessee shall not be punished for it in an action of waste.

2 Inst. 303, cites as adjudged in 9 E. 3.

A termor shall be punished for waste done by a stranger.

F. N. B. 60, (G); ‖1 Taunt. 196, 201.‖

2. *How far it lies against Executors, &c.*

Waste lies against *one executor* alone, without naming his companion, if the waste was done by him alone.

2 Inst. 302.

If termor does waste, and makes executors and dies, the action of

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waste is lost, for it does not lie against the executors, but for waste done by themselves, and not for the waste of the testator; for it is as a trespass, which is an action personal, which dies with the person.

Bro. *Waste*, pl. 138; S. P., 2 Inst. 302. It is the same in case of administrators. Went. Off. of Exec. 127. But Brownl. 239, says, that an action of waste lies against executors for waste done by testator.

Executor *de son tort* of a term is chargeable in waste.

3 Lev. 35, Mayor, &c., of Norwich v. Johnson, S. C. 3 Mod. 90, it was objected in error, that if the plaintiff is entitled to this action, it must be by the statute of Gloucester; but that it will not lie against the defendant even by that statute, because the action is thereby given against the tenant by the curtesy, in dower, for life or years, and treble damages, &c., and that the defendant is neither of these; and that it being so penal a law shall be taken strictly. But *per cur.*—This is a remedial as well as a penal law, and therefore shall have a favourable construction. And the judgment was affirmed.

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When the reversion is devested, the lessor cannot have an action of waste, because the writ is, that the lessee did waste *ad exhæredationem* of the lessor, and that inheritance must continue at the time of the action brought.

1 Inst. 356 a.

If a man brings an action of waste, and dies before any recovery, his heir shall not have an action for the same waste, because the damages do not belong to him. *Contrà* 20 E. 1,(*a*) *Liber Parliamentarum* 33 *b*, adjudged in parliament upon debate, and there commanded to the justices henceforth to do accordingly in such case.

[(*a*) That is, the statute of 20 E. 1, c. 4; which statute is an authoritative decision in parliament of a point arising in a cause then pending in the bench; upon which occasion the parliament not only declared how the law should be held in future, but likewise directed the justices to proceed in that manner in the case then before them. *Note:* This act is not to be found either upon the parliament rolls, or among the statute rolls.] Lord Coke says, upon the statute of Gloucester, cap. 5, it has been received for a certain rule, that if waste be committed, and he in the reversion die, the action of waste fails, for that the heir cannot recover damages for the waste in the life of the ancestor, and the waste was not done to the disinheritance of the heir; and yet the law extends the action of waste favourably, as much as with convenience may be, lest waste which is hurtful to the commonwealth should remain unpunished. 2 Inst. 305.

If lessee for years does waste, and after lessor enters upon him by *tort*, he shall not have an action of waste against him during his own seisin, before re-entry by the lessee; because the action ought to be in the *tenet*.

Bro. *Waste*, pl. 84; F. N. B. 60, (L), in the new notes there (*b*), says, the action is suspended, and cites S. C.

If lessee for life does waste, and after aliens in fee, and lessor enters for forfeiture, yet he shall have an action of waste against lessee; for peradventure if he had not entered he should be disinherited. 45 E. 3, 9 b; 14 H. 8, 14; 8 H. 6, 10. (It seems in those cases he may have his action in the *tenet;* then it is clear that it lies.)

Bro. *Waste*, pl. 42, cites S. C. *per* Finchden, that the reversioner shall not have action of waste after his entry for waste done before the alienation. (In that case the action was brought in the *tenuit*.)

If tenant in dower leases for her life to him in reversion within age, who never took the profits, but at full age disagrees to the lease; he may have an action of waste for waste in the mean time.

30 E. 3, c. 16. So, if she leases to the heir within age, and a stranger, rendering rent

on condition of re-entry for non-payment of rent. F. N. B. 55, (E), in the new notes (*a*).——But if at the time of, or during the waste done, the heir takes any of the profits, the waste is dispunishable. F. N. B. 55, (E), in the new notes (*a*).

If, after waste done, the lessor grants over the reversion in fee, and retakes it, yet he shall not have an action for the said waste.

1 Inst. 53 b.

So, if after the waste done, the lessor grants over the reversion, and retakes it to him and his feme, and to his heirs; yet he shall not have an action for the said waste, because the estate, which was privy to the waste committed, is altered.

1 Inst. 53 b.

If *lease* be made *for life*, the *remainder for years*, an action of waste lies against lessee for life, notwithstanding the remainder for years; for *de minimis non curat lex.*

3 Roll. Abr. 829; 1 Inst. 54, S. P. For the recovery therein shall destroy the term for years. 2 Inst. 301; F. N. B. 59, (H).

But, if there be lessee *for life*, *remainder for life*, action of waste does not lie during the continuance of the mesne remainder.

2 Roll. Abr. 829. *But* in such case an *injunction* has been granted out of Chancery. Mo. 554, pl. 748, Anon., [and 3 Atk. 94, 210, 723.]——Bro. *Waste*, pl. 56, cites S. C. where Persay held it did not lie; but Belknap *contrà*. But Broke says, that the law at this day seems to be with Persay.——For if he should have an action against the first lessee, then the estate of him in remainder shall be destroyed; and such construction must be made to preserve the estate of a stranger, who is in no fault; but if remainder-man for life dies, then the waste is punishable as well before as after his death. 2 Inst. 301.

So, if there be lessee for *life*, the *remainder for life*, the *remainder in fee to another*, he in remainder shall not have an action of waste against the first lessee, during the continuance of the remainder for life.

1 Inst. 54; F. N. B. 58, (C), says that it lies notwithstanding; and at 59, (H), says, it appears by the register that the writ is maintainable, though the mesne remainder-life be between the tenant for life and him in reversion.——*So*, if *remainder-man for life surrenders* his estate to him in the remainder or reversion in fee. 5 Rep. 76 b, Paget's case.——And F. N. B. 58, (C), in the new notes (*b*), says, that waste does not lie till after the death or surrender of the particular estate. And 1 Inst. 54 a,(*t*), says, that where it is said in the register, and in F. N. B., that waste does lie, it is to be understood after the death or surrender of the mesne remainder.——But though he that has the inheritance cannot have action of waste during the life of the remainder-man for life; yet it was resolved, that he may seize timber trees cut down by the tenant for life; and also that a trover and conversion would lie for all of them, though he never seized parcel of them: for by the cutting them down an absolute property is vested in the plaintiff, unless they had been cut down for reparations, and so employed in convenient time. All. 81, 82, &c., Udall v. Udall.——And Rolle was of opinion, that an action of trover would lie for the reversioner against tenant in tail, after possibility of issue extinct; and he declared he was himself of that opinion, because he had only an impunity if he committed waste, but no interest in the trees. ——P. 10 Rep. 44 b, Jenning's case.

But, if there be lessee for life, the remainder for life, *after the death of the remainder-man*, an action of waste lies against lessee *for waste committed during the continuance of the remainder.*

2 Roll. Abr. 829, *contrà;* 50 E. 3, 4. So, where a *lease* is made *for years, remainder for life*, the *remainder in fee;* and lessee for years does waste, and then the lessee for life in remainder dies, the remainder-man in fee shall have waste, for waste done during the mesne remainder for life. Mo. 18, pl. 64, Anon.

Likewise, if a *feme*, *lessee for life*, marries, and after *lessor confirms the estate of the baron* to have for his life, by which the baron has a reversion

for life; yet, if waste be committed after, the action lies against baron and feme, and this reversion is not any impediment.

2 Roll. Abr. 829; 1 Inst. 299 b, S. P. Because the baron himself did the waste and the wrong, and therefore shall not excuse himself for doing the waste, in respect that he himself has the remainder.

If lessee *for life and for a year after* commits waste, an action of waste lies against him.

2 Roll. Abr. 829. A defendant pleaded that the lease was to *him, his heirs, and assigns for life, and a year after,* and demanded judgment of the writ. But Thorp said, that in this case the plaintiff could not have other writ than what he had, and that defendant might save his estate by protestation; and so he did, and pleaded *nul* waste done. Bro. *Waste,* pl. 101.

If a *man leases for life, and after grants the reversion for years,* and after lessee for *life commits waste,* no action of waste lies against him during the term for years.

1 Inst. 54 a. For he himself has granted away the reversion in respect whereof he is to maintain the action. Id. ibid. and 273 a.

But, if a man leases *for life or for years, and after grants a lease to commence after the* end of the first estate, an action lies against the first lessee, notwithstanding this future interest: and the term shall be saved in this case.

1 Inst. a, 54.

If there be a *feoffee of land upon condition,* and *the feoffor enter,* and *do trespass,* and afterwards the *condition be broken,* and the *feoffor enter,* yet the feoffee shall have an action of trespass against the feoffor, notwithstanding that he hath not the land wherein the trespass was done.

Perk. § 97.

Where a *lease* is made *to the husband and wife* for life or years, there the wife shall not be punished after the death of her husband for *waste done by the husband.*

F. N. B. 59, (J).

If a man leases *to A during the life of B, the remainder to him during the life of C,* if he commits waste an action of waste shall lie against him.

1 Inst. 299 b. *So,* if a lease be made to A for his life, the remainder to A for the life of B, if A does waste, an action of waste doth lie against him; for the wrongdoer hath both the estates in him; and of that opinion was Sir James Dyer, C. J. 2 Inst. 301.

But, if there be a *lease for years* or life, *remainder to a baron and feme in special tail, and lessee do waste,* and the *feme die without issue;* the baron shall not maintain any action upon the statute.

Mo. 18, pl. 64, Anon. But Brown said, that if the *remainder* be limited over *to the baron and his heirs,* and the feme die after the waste done, the baron (as he apprehends) shall have action for this waste done in the life of his feme, because the estate of tenant in tail after possibility is drowned in the inheritance. But Dyer denied it. Id. ibid.

If lessor *covenants* with lessee *not to bring action of waste during two years* against him, and after, during the two years, lessee does waste; lessor may, after the expiration of the two years, bring action of waste for the waste done within the two years; for the covenant is *no dispensation* as to the waste, as it was said, but only with his complaint during the two years.

Mo. 18, pl. 64, Anon. *But* otherwise it is, where one makes a *lease for two years dispunishable of waste;* for there he has dispensed with the waste, and not with the action only. Id. ibid., Anon.

(K) Of the Processes and Proceedings in Actions of Waste.

If lessee for life *without impeachment of waste, and reversioner, join in a lease for years*, lessee is dispunishable of waste during the life of the tenant for life, but after his death he is punishable; for, as Dyer and Brown said, though at first it should be said to be the lease of tenant for life, and the confirmation of him in reversion, yet by such death it is altered into another nature, and shall be said the lease of him in reversion.

Mo. 72, pl. 196, Nudigate's case.

A seised in fee makes *a lease for years*, and afterwards conveys the reversion to the *use of himself for life, without impeachment of waste*, remainder in fee: lessee for years commits waste: he shall not have the privilege to be dispunished of waste; but after the death of him in reversion for life he shall be punished.

Sir W. Jo. 51, pl. 2; Bray v. Tracy, Cro. Ja. 688, pl. 4, S. C., but that is only upon the point of a lease for years to A, remainder for life without impeachment of waste to B, remainder in tail to C, but saying nothing of the conveyance subsequent to the lease for years. The court held, that the plaintiff should recover; for though in the life of B the termor by his assent might have committed waste, and he had not been punishable afterwards, yet when he is dead, he that committed the waste has done it to the disherison of him in remainder, and it is all one as if it had been done after the death of tenant for life.

It was agreed, that the heir shall not have action of waste, in time of his father, but in his own time, and issue was taken accordingly.

Bro. *Waste*, pl. 76.

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The 13 E. 1, c. 14, enacts, *That of all manner of waste done to the damage of any person, there shall from henceforth be no writ of prohibition awarded, but a writ of summons, so that he of whom complaint is, shall answer for waste done at any time. And if he come not after the summons, he shall be attached, and after the attachment he shall be distrained.*

If the defendant be returned *nihil*, &c., so as peradventure he was never summoned, nor any other writ served whereby he might have notice, yet a writ of inquiry of waste shall be awarded by this branch of the statute, for here it is not specified that issues should be returned, &c., but generally; and by the writ the waste shall be inquired of by the oath of twelve men, where the defendant or any for him may attend if he will, and the jurors may find against the plaintiff. 2 Inst. 389.

And if he come not after the distress,(a) the sheriff shall be commanded(b) that in proper person he shall take with him twelve, &c., and shall go to the place wasted.

(*a*) If the defendant appears upon the distress, and pleads, and after makes default, the plaintiff shall not by this branch have a writ to inquire of the waste, because it is out of the words and purview of this act. 2 Inst. 390.——(*b*) Here are three things to be observed: First, That the sheriff ought to go in proper person; for that though *in rei veritate* he is no judge, yet this writ is in nature of a commission unto him, and he is *in loco judicis*, and therefore he ought to go in *propria personæ*. Secondly, Where some have holden that the sheriff may inquire upon this writ, by oath of six or eight persons, it appears that there ought not to be under twelve, for the words of this branch are *assumptis secum* twelve. Yet this is but an inquest of office, for it is taken *sans mise des parties*, that is, without any issue joined. Thirdly, The sheriff must go *ad locum vastatum* together with the jurors, and view the same, for *ista cadunt potius sub visu quam sub auditu*. 2 Inst. 390.——It was agreed by the whole court, that if six of the jury are examined upon a *voire dire*, if they have seen the place wasted, that it is sufficient, and the rest of the jury need not be examined upon a *voire dire*, but only to the principal. Godb. 290, pl. 298, Gage v. Smith.

And shall inquire of the waste done, and shall return an inquest, and

after the inquest returned they shall pass into judgment, like as it is contained in the statute of Gloucester.

If the waste be assigned in divers towns, the sheriff and the jurors must view all the places wasted in every of the towns, but he may inquire thereof in any one of the towns, and this copulative doth so knit the words together, as he cannot inquire in a foreign town. 2 Inst. 390.

The process incident to action of waste is, first, a writ of summons, made by the cursitor of the county where the land lies, and on the return of this writ the defendant may essoin, and the plaintiff adjourn, &c. Then a *pone* is to be made out by the filazer of the county, on the return of which a *distringas* issues for the defendant to appear; and upon his appearance the plaintiff declares, and the defendant pleads, &c. Or, if the defendant makes default, a writ of inquiry goes to the sheriff, to inquire by the oath of twelve jurors, what damage the plaintiff hath sustained, and then the party hath judgment to recover the treble of it. Also, after judgment entered, a writ of seisin is awarded to the sheriff to give possession to the plaintiff of the place wasted.

Compl. Attorney, 250, 251, 258, 259.

In waste against two by the bishop *ad exhæredationem ecclesiæ*, and process continued till the grand distress returned, one came and the other made default, and he who appeared was compelled to answer alone, for the process is determined against the other.

Bro. *Waste*, pl. 99.

In an action of waste the jurors shall have a view of the place wasted, &c., as an incident to the action of waste; for in the action at the common law, the jurors should have had the view.

Vin. Abr. (V) 22, (P) 491. It was agreed by the whole court, if the jury be sworn they knew the place, it is sufficient, although they be not sworn that they saw it, and although that the place wasted be shown to the jury by the plaintiff's servants, yet if it be by the commandment of the sheriff, it is as sufficient as if the same had been showed unto them by the sheriff himself. Godb. 209, pl. 289, Gage v. Smith.

Though the view in an action of waste was not returned on the process on which the first jurors appeared, and were sworn, and tried the issue, yet it was resolved to be good enough; because although the jurors ought to have the view, yet it was not necessary for the officer to return it; but the court on the trial ought to examine the matter, whether the jurors have had the view or not; for on the trial six jurors, at least, ought to have had the view, else the jury shall not be taken. And a day of continuance was given *eo quod* the jurors had not the view, and *interim videant, &c.;* and in an assize the view of the jurors is requisite, but it is never returned; for perhaps neither the sheriff nor the officer knows whether the jurors have had the view or not; for the words of the writ are *et interim videant, &c.*, and not *et interim haberi fac. visum:* so that the jurors may view the place wasted when the officer is not present; and therefore the officer is not obliged to return the view; but it ought to be examined on the trial, and the party may make his challenge to the jurors for that cause, if six of them, at the least, have not had the view, and the officer had returned that they had the view: yet, if it appeared on the trial, by examination, that they had not the view, the return would be to no purpose, nor conclude any of the parties, plaintiff or defendant.

2 Saund. 254, Green v. Cole.

‖ Where the jury found a verdict for the plaintiff, with damages, but

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omitted to find the place wasted; the court held, that the verdict could not be sustained, and made the rule absolute for a new trial.

Redfern v. Smith, 2 Bing. R. 262.‖

4 & 5 Ann. c. 16, § 8, enacts, That in any actions in any of her majesty's courts at Westminster, where it shall appear to the court that it will be necessary that the jurors should have the view of the place in question, the courts may order special writs of *distringas* or *habeas corpora*, by which the sheriff or other officer shall be commanded to have six out of the first twelve of the jurors, or some greater number, at the place in question, some convenient time before the trial, who shall have the matters in question shown to them by two persons in the writ named to be appointed by the court.

In an action of waste there shall be summons and severance, for the writ is *ad exhæredationem*, and the action of waste is a plea real.

2 Inst. 307.

A plaintiff shall have costs in all actions of waste, where the damages found do not exceed twenty nobles, which he could not by the common law.

Stat. 8 & 9 W. 3, c. 11.

Before any waste is done, a prohibition may be had, directed to the sheriff not to permit it; or he in remainder, &c., may have an injunction out of the Chancery to stay the waste, and enter the house or lands, to see if waste is committed, &c.

2 Inst. 146, 306; 11 Rep. 49, Liford's case.

Though the *estate* be *executed by the statute of uses*, yet there may be *a general writ and special count.*

Hobart's Rep. 112, Skeate v. Oxenbridge.

If the *writ mentions that A, being seised of the land since* 27 H. 8, *enfeoffed B to uses*, &c., and derives under it, though the writ *does not mention that the feoffment was to B in fee;* yet inasmuch as the *use had been to make the writs so ever since the statute*, it is to be allowed, though if it was not in fee to B, but an estate for the life of B, it will pass. But the *declaration* upon it *ought to allege the feoffment to be in fee.*

Hobart's Rep. 112, Skeate v. Oxenbridge.

A man, after the statute of 27 H. 8, made a *feoffment* in fee *to the use of himself for* term of his *life, and after* his decease *to the use of J S and his heirs.* The *feoffee does waste*, and J S *brought his action* of waste. And now if his writ shall be general or special was demurred in judgment. And Hutton and the other justices were clearly of opinion, that the *plaintiff ought to have a special writ;* and so it was adjudged afterwards.

Hetl. 79, Fossam's case.

In waste *against feme on a lease made to herself for life*, she *pleaded that the lease was made to her and her baron for their two lives, and that after the baron's death no waste was done, and so did not* plead to the writ; but it was said the writ had been better if the lease had been supposed to the baron and feme.

Thelual's Dig. lib. 11, c. 52, § 7.

Waste *by the feoffees in use against the lessee for years of cestui que use* lies well, though no form of writ be thereof given in the register or in the statute. But *quære* the form of this writ; for it was *cum W. & M.*

(K) Of the Process and Proceedings in Actions of Waste.

fuerunt seisiti ad usum C., and did not say of what estate; and therefore held ill in this by several.

Bro. *Waste*, pl. 2.

In a writ of waste, if the premises of the writ recite *quod non liceat alicui facere vastum in domibus, boscis, et gardinis*, and in the end of the writ it is said that the defendant *hast done waste in lands*, houses, woods, gardens, *and exile of men;* so as there is *more in the end of the writ than is in the premises*, yet the writ is good: and *so if less* be in the end of the writ than is recited in the premises, yet the writ is good; as if it had been recited *quod cum provisum sit, quod non liceat alicui facere vastum, &c. in terris, domibus, boscis, and gardinis:* and in the end it is recited *quod defend. fecit vastum in terris* only, or *in boscis* only, or *in domibus* only, yet the writ is good.

F. N. B. 56, (J).

If *lease* be made to *husband and wife for life, and for twenty years after their deaths*, and the wife dies and waste is committed, the wife shall not be named in the writ, nor the term after her death.

Brownl. 238, Bedell v. Bedell.

Note, that the action of waste *against the guardian* is general, *fecit vastum, &c., de terris, &c., quas habet vel habuit in custodia de hæreditate prædict.*, which writ doth extend as well to the guardian *in socage as in chivalry.*

2 Inst. 305.

1. *In what cases the Action shall be brought in the* Tenet.

If lessee for *life does waste, and grants his estate*, yet action of waste lies against him in the *tenet.*

2 Roll. Abr. 829. It shall be in the *tenet* during the term, because in the eye of the law he is tenant as to the action of waste, and against him that was the wrongdoer did the action accrue, which he cannot avoid by his assignment, and against him shall the treble damage be recovered, and the place wasted. And so it is of mesne assignees; a just interpretation that he that did the wrong should answer the same; and this is the cause that general non-tenure is no plea in an action of waste, but special non-tenure may be pleaded, as the granting over of his estate, before which no waste was done. 2 Inst. 302.——In waste it is no *plea that the defendant had nothing in the land the day of the writ purchased;* for if *he does waste and grants his estate over*, yet waste lies against him; for the grantee may say *that* no waste was done after the grant made to him, and the other will incur no mischief if he has done no waste; for he may say that such a day he granted over his estate, before which grant no waste was done. *Per* Finchden clearly, and the action of waste was *quas tenet.* And yet *non-tenure is no plea;* for by him waste is only trespass, and by recovering against him the grantee shall lose the place wasted; for the plaintiff has elder title than the grantee. Bro. *Waste*, pl. 22.——In waste *quas tenet* the *defendant said that he had nothing the day of the writ purchased, nor ever after*, judgment of the writ, and held no plea; for if a man does waste, and grants his estate over, the *writ shall say that they held as long as the term continued*, and by this the grantee, who is no party to the writ, shall lose the place wasted. Bro. *Waste*, pl. 25.

If a *guardian commits waste, and grants his ward* over, the ward shall have waste, during the infancy in the *tenet*, against the first guardian for the said waste.

2 Inst. 305.

And if the ward brings it against any *during his nonage*, it shall be in the *tenet.*

Bro. *Waste*, pl. 33. And yet if he was guardian before the writ purchased, he shall not be *charged* but to his own time, and *every guardian for his own time.* Id. ibid.

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If a *lease for life* be made *upon condition that if the lessee do such an act, his estate shall cease*, and he commit such an act, the writ shall be brought against the lessee in the *tenet*, though his *estate is ended.*

Brownl. 239, Anon.

If *feme lessee for life grants his estate* over, *and after marries*, the action shall suppose that *tenet.*

2 Roll. Abr. 829.

So, if *lessee for life does waste, and after aliens*, and lessor enters for the forfeiture, the writ shall be in the *tenet.*

2 Roll. Abr. 830; Bro. *Waste*, pl. 84, takes notice only of lessee for years, (this was the principal point of the case,) and that in such case the writ shall be in the *tenet;* but that in case of *lessee pur auter vie* where *cestui que vie dies*, it shall be in the *tenuit.*

Action was brought for waste *in lands quas tenet pro termino annorum*, and *counted that he leased to the defendant*, 10 H. 7, *for term of one year, to commence at Easter next after, to continue for one year, and so the next year, and so from year to year as long as the parties pleased, by virtue of which possession, &c., he occupied by the space of twenty-four years, and assigned the waste certain, &c. The defendant pleaded no waste* done, and *found for the plaintiff.* And the action was brought *anno* 14 H. 8. And the *court held that the count abated the writ; for where it is* tenet, *and is thirty years after the making, and counts of twenty-four years*, this is a determination of the lease a long time before the writ purchased, and therefore shall be *tenuit*, and not *tenet.*

Bro. *Waste*, pl. 95; *But* where a man *leases for years, and brings writ quas tenet* of the waste, &c., and the *term expires pending the writ*, yet this writ *quas tenet* is good, *quod cur. concessit.*

If a *lessor bring waste*, the writ shall be *quod fecit vastum, &c., in terris* which he holds of him.

2 Roll. Abr. 830.

But if he in the remainder bring action of waste, the writ shall not be which he holds of him, because he does not hold of him.

2 Roll. Abr. 830.

So, if such remainder escheat, and the lord bring the action of waste, the writ shall not be, which he holds of him.

2 Roll. Abr. 830; Bro. *Waste*, pl. 6.

If the *father lease for life and die*, and afterwards *his heir confirm the estate* of the lessee for his life, he shall have action of waste, *quas tenet* of his demise; because the first lease is determined by the confirmation. *Per* Dyer and Brown.

Mo. 72, pl. 196, in Nudigate's case.

If there are two *joint-tenants of land limited to them and the heirs of one*, and they *join in a lease for years*, and the *tenant for life dies*, the other shall have an action of waste of his demise. *Per* Dyer and Brown.

Mo. 72, pl. 196, in Nudigate's case.

2. *In what Cases it shall be brought in the* Tenuit.

There is not any writ in Chancery in the *tenuit* against tenant for his own life.

2 Roll. Abr. 830.

(K) Of the Process and Proceedings in Actions of Waste.

But, it shall be brought in the *tenuit against lessee for years after the term passed.*

2 Roll. Abr. 830.

But, if it be *not brought in the tenuit*, yet, *if there are any words in the writ which imply that it is past, it is good*, as *quas ei dimisit.*

2 Roll. Abr. 830.

After the death of cestui que vie *it shall be brought against the tenant pur auter vie* in the *tenuit.*

2 Roll. Abr. 830; Bro. *Waste*, pl. 47, cites S. C. And *per* Persay, if lease be made *to the feme, and she take baron, who does waste*, and the *feme die*, waste against the baron shall be *quod tenuit.* Bro. *Waste*, pl. 103, S. P. For he may hold over the term.

If *tenant pur auter vie do waste, and alien*, and lessor enter for the forfeiture, the writ shall be against him in the *tenuit.*

2 Roll. Abr. 830.

Likewise, if waste be *brought against a guardian after full age* of the ward, the writ shall be in the *tenuit.*

2 Roll. Abr. 830.

So it shall be in the *tenuit*, if it be brought after full age against a guardian *for waste before assignment over.*

2 Roll. Abr. 830.

If *feme lessee for years do waste*, and the *term incur*, and *she marry*, the writ shall be against baron and feme, and shall suppose that they *tenuerunt.* (*Quære* this, for it seems it shall be the *feme tenuit dum sola fuit.*)

2 Roll. Abr. 830.

If *feme tenant pur auter vie do waste*, and *cestui que vie die*, and *the feme marry*, the writ shall be that the feme *tenuit.*

2 Roll. Abr. 830.

If the *lessee make a feoffment, and the lessor re-enter*, the action of waste shall be in the *tenuit, because the lease is determined.* And *where he continues it, it shall be quas tenet.* Note the diversity.

Bro. *Waste*, pl. 95.

So, if tenant do waste, and then *surrender* to his lessor, the writ shall be in the *tenuit*, as some hold; but others hold it should be in the *tenet*, whether he be tenant for life or years.

Bro. *Waste*, pl. 95; F. N. B. 60, (L,) in the new notes there, (*b*) S. P. And if he in the reversion agree thereunto, he shall not have an action of waste in the *tenuit*, for he cannot, by his own act, alter the form and nature of his action, from the *tenet* to the *tenuit;* and he cannot plead that before such a surrender no waste was done. 2 Inst. 304.

Likewise, if grantee of a term *upon condition* do waste, and after the grantor enter for condition broken, an action of waste shall be maintainable against the grantee in the *tenuit.*

5 Rep. 12 b, Saunder's case.

Where A was *lessee for years* and *devised his term to B, and* made C *his executor*, and died, and C *did waste, and assented to the devise;* in this case, though between the executor and devisee this has relation, and the devisee is in by the divisor, yet an action of *waste shall be maintainable against the executors in the tenuit.*

5 Rep. 12 b, Saunder's case.

(L) Of the Pleadings in Action of Waste.

It is a good plea in waste, that the house was ruinous at the time of the demise, and therefore fell: or that the house or trees fell by wind or tempest.

Bro. *Waste*, pl. 130.

In an action of waste brought by the lessor against the lessee, the lessee in respect of privity cannot plead *riens en le reversion;* but he must show how and by what means the reversion is divested out of him: but if the grantee of a reversion brings an action of waste, the lessee may plead generally, that he has nothing in the reversion.

1 Inst. 356, a.

In an action of waste by the heir against his father, upon a gift to the father and mother and to the heirs of the mother, the tenant said, that he discontinued to R in the life of the feme, *absque hoc* that the plaintiff had any thing in the reversion, in the right of his wife, the day of the writ purchased, or after; and the plea was held double: and *per* Martin and others, nothing in reversion only is a good plea there. *Contrà*, where the plaintiff counts of his own lease, or of the lease of his ancestor. But it is a good plea in waste *ex assignatione*, upon grant of reversion to the plaintiff. Note the diversity.

Bro. *Waste*, pl. 85.

And in waste against tenant by the curtesy, it is a good plea that he discontinued in fee to R in the life of the feme, and after R leased to him for his life, saving the reversion, and so nothing in reversion the day of the writ purchased, &c.

Bro. *Waste*, pl. 85.

And where the plaintiff counts of his own lease, or of his ancestor's, the tenant may say *quod non dimisit*, and show how the heir has granted the reversion to another to whom he attorned, after which attornment no waste done.

Bro. *Waste*, pl. 85.

In waste the defendant said as to the grange, that the moiety was decayed before the lease, and the other moiety was uncovered by tempest; and before the defendant could repair it, the plaintiff entered and was seised the day of the writ purchased; judgment *si actio*. *Per* Hank, the last plea is double, the tempest and the entry; but Hull, *contrà*.

Bro. *Waste*, pl. 69, for, *per* Hull, the entry is all the matter, for the tempest is not waste, unless the defendant permits the timber to rot after the tempest. Bro. *Double Plea*, pl. 30.

Where a lease is upon a condition, that if the tenant suffers waste he may enter, there he cannot enter for uncovering by tempest, unless he says that the lessee had sufficient time after to repair it, and did not. *Per* Hull, clearly.

Bro. *Waste*, pl. 69.

In waste for permitting a house to be uncovered, by which the timber became rotten and corrupt, defendant said, that the day of the writ purchased, the house was sufficiently repaired; and the best opinion was, that it is no plea: for it is in a manner double; the one, that if waste was done it is amended; and the other, that there never was waste. But, if he had

said, that after the waste, it was sufficiently repaired before the writ purchased, it seems to be a good plea.

Bro. *Waste*, pl. 86.

Waste in ten ashes, the defendant said, that the plaintiff gave them to R C, and commanded the defendant to cut and deliver them to the said R C, by which he did so; judgment *si actio:* the plaintiff said, that he did not cut by his command. *Per* Newton and Paston, this is a *negative pregnant*, by which he said that he did not command him; *quod nota.*

Bro. *Negative, &c.*, pl. 21.

Where a lease is by deed without impeachment of waste, or by grant to be discharged of waste, all by one and the same deed, the tenant may rebut, and plead in bar by it, and shall not be driven to his writ of covenant: *per* Paston. Brooke makes a *quære*, If he shall be driven to his writ of covenant, if it be granted by another deed.

Bro. *Waste*, pl. 89; Bro. *Bar.* pl. 8. C., and Brooke says, it seems to him, that if the grant be by *another* deed, it may well be pleaded in bar also.

If a man leases land to another *sine impedimento vasti*, it shall be a good bar in an action of waste; for those words (*sine impedimento vasti*) amount to as much as without impeachment of waste.

2 Roll. Abr. 835.

So, if a man leases the manor of D, and all lands and tenements, &c., parcel of the said manor, to have the aforesaid manor, lands, woods, &c., as house-bote and hay-bote, *sine impedimento vasti* for years; this shall be a good bar in an action of waste; for the words (*sine impedimento vasti*) relate to all the things demised, and the expressing of house-bote, &c., is surplus and void.

2 Roll. Abr. 835.

Where the defendant justifies the waste of cutting ashes for fire-bote, he ought to surmise, that there were no underwoods upon the land, &c. And the same law seems to be where he takes beeches or other trees which are timber, by the best opinion of the court.

Bro. *Waste*, pl. 89.

If lessee does waste by cutting trees, and lessor carries them away, (admitting the carrying away tortious, for there it is held, that he may have trespass for them against the lessor,) yet this is not any matter in bar of the action; but he shall be put to his trespass.

44 E. 3, 44 b. For the carrying them away by the lessor is no excuse of the waste, which the lessee was guilty of by the abatement. Bro. *Waste*, pl. 39, cites S. C.

Waste in a house, and also in a wood in cutting the trees and selling them, &c. The defendant as to the house said, that no waste was done; and to the trees, that the house was ruinous in groundsels at the time of the demise, by which he cut for reparations, and put the trees in the groundsels; and *per cur.* this is a good plea where the plaintiff counts generally of cutting trees without more, but *contrà* where he counts of sale, as here; for there he shall answer to the sale; by which Catesby justified as above, *absque hoc* that he sold them, and good reason, for the writ of waste is, *quod non liceat alicui vastum, venditionem, seu destructionem facere in terris, domibus, boscis, &c.*

Bro. *Waste*, pl. 112. In waste for trees cut and sold, the defendant must answer to both: for the sale is traversable, and admit that he cuts and sells and buys them again, and bestows them upon the repairs of the house, yet the tort which is supposed in the

sale is not answered; *per* Montague. And Knightly seemed to be of the same opinion; and he ought also to conclude that it is the same waste. D. 35 b, 36 a, pl. 33, 34, in case of Malverer v. Spink; D. 90 b, pl. 8, in case of Mervin v. Lyds.

Ne venda pas is no plea, but defendant shall justify as in the plea above, *absque hoc*, that he sold; or shall say, no waste done generally.

Bro. *Waste*, pl. 112, *per* Choke, J.

In trespass it was agreed, that tenant for years may cut wood, but it was doubted of tenant at will; but it seems that as long as tenant at will is not countermanded, he may cut seasonable wood, &c. Littleton said, then he ought to say, they have used such custom in the country to cut underwood, for otherwise the justification is not good. *Quære inde.*

Bro. *Waste*, pl. 114.

Note—Where hedge-bote or pale-bote are granted to be taken reasonably, and where certain loads or a certain number of trees are granted annually for that purpose, here it is not necessary to show that the fence is in decay: and note, that for fire-bote it is not necessary, at the time of cutting to show the necessity: so, for reparation, for it is reason and good husbandry to cut them in some convenient time beforehand; because that which is allowed certainly at some years may not be sufficient.

Noy, 23, Jenkins v. Jenkins.

If a man leases a house, and grants farther to lessee, that he may make his best profit of it; this grant shall not be any bar in an action of waste for abating the house; for the grant shall be intended, that he shall make his best profit according to the law, without tort and disinheritance to the lessor. *Dubitatur.*

17 E. 3, 7, S. C. cited, *Arg.* Lat. 137, in the case of Daniel v. Upley.

So, if the lease be of a wood, with grant to make his best profit of it, he cannot cut and sell. *Dubitatur.*

17 E. 3, 7 b.

But if a man leases land, and grants farther to the lessee, that he shall make his best profit of the mines of stones, coal, and iron, open in the land; this grant shall be a good bar in an action for waste for digging coals, stone, and iron, and selling; for the most profit of them is to sell, and he can have little other profit.

17 E. 3, 7 b. Lessee for years of mineral lands, with liberty to dig, and make his profit of the mine, digged for mine, and sold the gravel coming off it; this is no waste, if the first act of digging be not waste: for the sale is not waste, that being a subsequent act. Adjudged, Godb. 28, pl. 37; 27 E. C. B. Anon.

In waste by him in remainder, he ought to show the deed of remainder.

Bro. *Waste*, pl. 28. He shall show the deed, if it be demanded by the tenant. But *per* Finch, he need not show it till then. Bro. *Monstrans*, pl. 15.

In waste against tenant for years of the lease of the plaintiff himself, the defendant pleaded that the plaintiff *nil habuit in tenementis* but jointly with his wife in tail, &c., and held a good plea.

Theloal's Dig. lib. 11, cap. 44.

So, in waste against baron and feme, on a lease to them both made by the plaintiff's father, the tenants pleaded, that the plaintiff's father *ne lessa pas* to them, *modo et forma*, &c., and held a good plea.

Theloal's Dig. lib. 11, cap. 52, S. 25.

But in waste against tenant in dower, she pleaded a grant made to her by the heir, to hold without impeachment of waste, and averred that he

had assets by descent; and the opinion was, that it is no plea: For the statute of Gloucester speaks of warranty with assets to bar the tail, and not of grant with assets.

Bro. *Waste*, pl. 76.

In action of waste against tenant in dower, it is a good bar, that the baron who was the ancestor of the plaintiff, aliened to B, who assigned to her her dower, and so the reversion is in him, and not in the plaintiff.

39 E. 3, 33.

In waste against tenant by the curtesy, or in dower, they may say, that the plaintiff granted the reversion to M N to whom they attorned.

Bro. *Release*, pl. 46. If the heir granted away the reversion, and tenant attorned, the action failed at common law. 2 Inst. 300.

In waste, the plaintiff counted upon a lease for years, by him made to the defendant, and that he did waste: and the defendant was not suffered to say, that he did not lease for term of years, but that he did not lease *modo et forma*, &c.; for if he leases for life or in fee, the defendant may plead it, and traverse the count, &c.

Bro. *Negativa, &c.*, pl. 7.

In waste against A for tenements, which he held of the lease of E, who held them for term of life of the lease of his father, the defendant said, that he had(*a*) nothing in the tenements the day of the writ purchased, nor ever after; but E was and is tenant; judgment of the writ, and *non allocatur;* upon which he said, that E was tenant the day of the writ purchased, *absque hoc*, that he ever any thing had of the lease of E, which was held a good plea, and the other maintained his writ; *quod nota*, and yet *non-tenure* is no plea in waste; but it seems that this amounts to that E *non dimisit modo et forma.*

Bro. *Waste*, pl. 35; Bro. *Non-tenure*, pl. 55. (*a*) Bro. *Non-tenure*, pl. 7.

Waste was brought against tenant for life for digging clay and gravel: the defendant justified, by command of the plaintiff; and the best opinion was, that it is no plea; for the lessor himself cannot justify to dig it, therefore his command is void; as if I command J S to kill my father, which he does, I shall have appeal; and in formedon, if writ of estrepement is delivered to the tenant, the demandant cannot command him to cut the trees, but estrepement lies, for those commands are void.

Bro. *Waste*, pl. 108. The lessor was seised in fee, but in his lease did not except the gravel, and so his command, during the lease, is not good; and, by Townshend, this gravel is part of the inheritance, and he cannot grant his inheritance by parol only without deed. See the Year-Book, 2 H. 7, 14.

But where W brought waste against the defendant, tenant for life, by reason of a remainder to him limited by use; and assigned the waste *prosternendo horreum;* the defendant pleaded in bar, that the great timber of the said barn, at the time of the death of her husband, was so rotten, &c., that it could not be repaired; this was taken to be a good plea, and issue taken upon the matter.

Mo. 54, pl. 158, Ward and Uxor v. Dettensam.

The plaintiff made a lease for years to A, and before the expiration thereof he made another lease of the same lands to B, the defendant, to begin presently, and then brought an action of waste against him for waste done during the first lease: the court said, that in such case it would not be safe for him to plead no *waste done*, for it would be found against him,

and if he should plead the special matter, as aforesaid, viz., that the first lease was in being at the time of the waste done, after the expiration whereof no waste was done, this would be good, if the second lease was not by indenture, otherwise, he will be estopped by the indenture from showing that the second lease had another beginning than the indenture purports, and then the waste will charge him. And if defendant pleads the special matter, the plaintiff by his replication, may estop him to plead any other beginning of the term than the letter of the indenture purports, and it will be no departure, because it strengthens the declaration.

3 Le. 203, pl. 256, Thorp v. Wingfield.

Ancient demesne is no good plea in an action upon the statute of Gloucester, for it is only a personal action, and the statute is beneficial to the commonwealth.

Ow. 24, C. B. Owen's case.

In waste for cutting down 300 oaks, the defendant pleaded as to 200 of them, that the house leased was ruinous, &c., and that he cut them down to repair the houses, and as to the residue, that he felled and keeps them to employ about the reparations *tempore opportuno*. And all the court, without argument, held it no plea: For if it should be good, every farmer might cut down all the trees on his farm, when there was no manner of occasion to repair.

Cro. Eliz. 593, pl. 33, C. B., George v. Stamfield.

If two bring an action of waste, the release of one is a good bar against the other.

1 Inst. 355 b. If the action by two be brought in the *tenuit*, a release of the one is a bar to both. But otherwise it is the *tenet*, for there the release of one does not bar the other. Id. ibid.

If there be tenant for life, the remainder over in tail, and he in remainder release to the tenant all his right, this is a good bar against the releasor in a writ of waste; and yet neither fee nor fee-tail pass.

Bro. *Waste*, pl. 145. But if tenant in fee release to his tenant for life all his right, yet he shall have action of waste.—So, if lessee for life do waste, and grant over his estate, and lessor release to the grantee; in an action of waste against the lessee, he shall plead the release: and yet he has nothing in the land. 1 Inst. 269 b.—And so in waste shall tenant in dower, or by the curtesy, in the like case, and the vouchee and the tenant in a *præcipe*, after a feoffment made, and so in a *contra formam collationis*. Id. ibid.

(M) Of the Judgment in Actions of Waste, and what shall be recovered thereby.

Statute of Gloucester, 6 E. 1, c. 5, enacts, *That he*(*a*) *which shall be attainted of waste, shall lease*(*b*) *the thing that he hath wasted: and moreover shall*(*c*) *recompense thrice so much as the waste shall be taxed at.*

(*a*) If one joint-tenant does the waste, both shall be attainted of the waste, &c. 2 Inst. 303.—But treble damages shall be recovered against him that did the waste only. 2 Inst. 302; ‖Cru. Dig. tit. xviii. c. 1, § 63.‖——(*b*) In an action of waste against a lessee for life, for waste done in three acres, the defendant claims fee; whereupon issue is joined; the jury find against the defendant, that he hath but an estate for life; and inquired further of the waste, and found the waste done in one acre only. The plaintiff cannot have judgment for the whole land, in respect of the forfeiture and treble damages; for that judgment is not according to this act, that is to say, of the place wasted, and treble damages in respect of the place wasted; wherefore he had judgment according to the statute, of one acre and treble damages. 2 Inst. 305.——(*c*) Wheresoever the common law gave single damages against any, this act gives treble, unless there be any special provision made by this act. 2 Inst. 306.——This statute does not bind the king. *Per* Coke, *Arg.* Mo. 321, in Englefields case.

(M) Of the Judgement in Actions of Waste, &c.

And for waste made in the time of wardship, it shall be done as is contained in the Great Charter.

If the guardian suffers a stranger to cut down timber trees, or to prostrate any of the houses, and according to his name of guardian doth not endeavour to keep and preserve the inheritance of the ward in his custody and keeping, nor to forbid and withstand the wrongdoer, this shall be taken in law for his consent: for in this case *qui non prohibit quod prohibere potest assentire videtur;* and if such waste and destruction be done without the knowledge of the guardian, or with such number as he could not withstand, then ought the guardian to cause an assize to be brought against such wrongdoers, by the heir, wherein he shall recover the freehold and the damages for such wrong and disherison. So note a diversity between the interest of a guardian created by law; for there in an assize the heir shall recover damages; but otherwise it is in case of a lease for years, which is the lessor's own act. 2 Inst. 305.

And where it is contained in the Great Charter, that he which did the waste during the custody shall lease the wardship; it is agreed that he shall recompense the heir his damages for the waste, if so be that the wardship lost do not amount to the value of the damages before the age of the heir of the same wardship.

The committee of a ward did waste, and after tendered marriage to the heir, and he refused, and married elsewhere. The waste is found by office. The question was, Whether the committee may bring forfeiture of marriage? The court upon advisement held, that the committee by doing waste lost only the ward of the land, and not of the body, by the express words of this statute. Dy. 25 b, pl. 163, Anon.

Upon the construction of the statute of Gloucester, some question has been made, Whether in this mixed action the place wasted is the principal or the damages? And in divers respects the one is more principal than the other: for in respect of the antiquity against tenant in dower, and tenant by the curtesy, the damages are the principal; and therefore they shall be sometimes preferred, viz., the plaintiff to have execution of the damages before the place wasted; but in respect of the quality, the reality is ever preferred before the personalty; and therefore in waste, if the defendant confess the action, the plaintiff may have judgment of the land, and release his damages, which proves the realty to be the principal; for *omne majus dignum trahit ad se minus.*

2 Inst. 307.

If two coparceners lease land for life, and after waste committed one dies, the aunt and niece must join in the action; and though the niece shall recover no damages, yet she shall recover the place wasted: and it seems they shall hold the same in coparcenary.

F. N. B. 60, (R).

In waste at the *nisi prius* waste was found in four oaks in divers parts in a wood: and it was doubted if he shall recover the wood or the place wasted: and at last it was awarded, that he recover the place wasted, and his treble damages.

Bro. *Waste*, pl. 24. If termor of a wood does waste in one corner of the wood, he shall not lose all the wood, *per* Fineux, C. J., but only the place wasted. Bro. *Waste*, pl. 96.—But, if there are divers plots of the land in the wood in divers places, if the termor does waste in the wood, he shall lose those plots, though he did not do waste in them; for those are parcel of the wood: And this seems to be where he has done waste in the wood *sparsim et circumquaque;* and this was said by Fineux in the Reading of Thecher. Ibid.

If trees growing *sparsim* in a close are cut, in an action of waste all the close shall be recovered.

1 Inst. 54 a; Brownl. 240, S. P. Anon., and the treble value shall be levied by *fi. fa. &c.* Id. ibid.

(M) Of the Judgment in Actions of Waste, &c.

If waste be done in divers rooms in a house, the rooms shall be recovered in an action of waste, and not all the house.

Inst. 54.

But if waste be done in a house *sparsim* throughout the house, all the house shall be recovered.

2 Inst. 54.

If waste be done in the hall of the house, yet all the house shall not be recovered, though some say that the house has its denomination from the hall.

2 Inst. 54. In ancient time, it was holden by some, that if the hall was wasted, the whole house should be recovered; for that in those days the hall was the place of the greatest resort and use, insomuch, that the whole house was called by the name of the hall, as Dale Hall, &c., but the purview of the statute of Gloucester is, that he shall lose that thing that he hath wasted. 2 Inst. 303, 304.—Noy, attorney-general, in Mr. Atkins's Reading, held, that the 15 E. 3, tit. *Waste*, 8, that in waste of the hall the house shall be recovered, was good law, contrary to the opinion of 1 Inst. 54 a. And he cited the case of Lord Abergavenny v. Sir Richard Southwell, in an action of waste, for waste done in the kitchen and larder of a castle, and all the castle was recovered, because a castle is not dividable, and so adjudged. 11 Eliz. See D. 272 b; Marg. pl. 33.

If a man brings an action of waste, because the pales of a park, which encompass the park, were permitted to decay; but it is not averred that there were any deer in the park, or that thereby the deer were dispersed, and in this action the plaintiff recovers; he shall not recover all the land which is comprised within the pale, but only the place where the pale stood. And the court seemed to incline to it in a writ of error upon such judgment in bank, the judgment being affirmed in the King's Bench to recover the place wasted.

2 Roll. Abr. 836.

If a man does waste, and grants his estate over, yet upon an action brought against him, he shall lose the place wasted; and his grantee, who is not party to it, shall lose his interest. And therefore it is a good plea for the grantee, that such a day he granted his estate over, before which grant no waste was done: and in an action against the grantee it is a good plea, that J N granted it to him, after which grant no waste was done.

Bro. *Waste*, pl. 33.

In waste by two upon a lease for term of life, one was summoned and severed, and the other sued forth, and assigned the waste in divers things, as in cutting willows; and found for the plaintiff, and damages were taxed, and he had judgment to recover the moiety of the damages, and the moiety of the place wasted, and as to the willows the court advised.

Bro. *Waste*, pl. 115.

If a man does waste in hedge-rows which surround a pasture, nothing shall be recovered but the place wasted, viz., the circuit of the root, and not the entire pasture.

Bro. *Waste*, pl. 136.

If the tenant of one house is disseisor of the next house, and he pulls down both, and builds them into one new one, disseisee shall recover all the house.

Vin. Abr. (V), 22, 509.

When waste is brought in the *tenuit*, damages are only to be recovered.

Rep. 44, Blake's case.

(N) In what Cases in general Waste may be restrained, &c.

If lessee for years or life grants a rent out of the land so leased, and afterwards commits waste, if the lord recovers the place wasted, yet the land shall be charged.

Brownl. 238, Anon.

{In an action of waste against tenant for years for converting three closes of meadow into garden-ground, if the jury give only one farthing damages for each close, the court will give the defendant leave to enter up judgment for himself, on account of the smallness of the damages.

2 Bos. & Pul. 86, The Governors, &c. of Harrow School v. Alderton.}

(N) In what Cases in general Waste may be restrained by Injunction in Equity.

[A COURT of equity will interpose by injunction to prevent the assertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of timber of great value, their title being doubtful, the court entertained a bill at the suit of the lord of the manor to restrain the assertion of it. But in this, and indeed in all cases of waste, the title of the plaintiff must be set forth fully {1} and particularly in his bill, else the defendant may demur. The bill must likewise be supported by an affidavit of the waste committed or {2} threatened; though in some cases the injunction has been granted without one. But the court will not restrain the defendant from working a mine already opened, even where there is an affidavit,(*a*) unless it appear that he has only a term in the estate for years or for life, and that the reversion be in the plaintiff: or,(*b*) that it be a breach of an express covenant, or an undisputed mischief.

Stonor v. Strange, Mitf. Eq. Rep. 123; Whitelegg v. Whitelegg, 1 Bro. Ch. Rep. 57; P. R. C. 213. {Vide 4 Ves. J. 700, Dench v. Bampton. {1} And it must be positively sworn to, or the injunction will not be granted. 6 Ves. J. 784, Davies v. Leo. Nor will it be granted against a defendant who is in possession and claims by an adverse title. 6 Ves. J. 51, Pillsworth v. Hopton; 8 Ves. J. 89, Smith v. Collyer. {2} 7 Ves. J. 417; 11 Ves. J. 54.} (*a*) Lowther v. Stamper, 3 Atk. 496. (*b*) Anon. Ambl. 209.

If a parson commit waste upon the glebe, an injunction will be granted on the application of the patron. So, if the widow of the late incumbent commit waste during the vacancy.

Bradly v. Stratchy, Barnardist. Ch. Rep. 399; Stratchy v. Francis, 2 Atk. 217; Hoskins v. Featherstone, 2 Bro. Ch. Rep. 552;] {1 Bos. & Pul. 105, Jefferson v. The Bishop v. Durham.}

||The lord of a manor is now held to be entitled to an injunction and account, in respect of waste committed by a copy-holder.

Richards v. Noble, 3 Meriv. 673; *sed* vide Dench v. Bampton, 4 Ves. 700.||

If a tenant for life plant woad on the land, which is of so poisonous a quality that it destroys the principles of vegetation, without an express power in his lease, where it is usual to have such powers, it may be considered as waste, and the Court of Chancery may grant an injunction.

MS. Rep. Marquis of Powis v. Dorall, Canc.

If there be lessee for life, remainder for life, the reversion or remainder in fee, and the lessee in possession waste the lands; though he is not punishable for waste by the common law,(*c*) by reason of the mesne remainder for life, yet he shall be restrained in Chancery, for this is a particular mischief.

Moor, 554, S. P.; 1 Vern. 23, S. P.; [3 Atk. 94, 210, 723, S. P.;] {6 Ves. J. 787,

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Davies v. Leo.] (*c*) That such lessee is not punishable by the common law, during the continuance of the remainder, though after its determination he is. Vide 1 Inst. 54; 2 Inst. 301.

But if such lessee has in his lease an express clause of *without impeachment of waste*, he shall not be enjoined in equity.

1 Vern. 23. Although a court of equity will not assist a forfeiture, yet the tenant in possession shall be restrained in equity from committing waste in all cases in which waste is punishable by law; and for this purpose an injunction will be granted before the bill is filed. Also, an injunction will be granted to stay waste in behalf of an infant *in ventre sa mere*. Equity will likewise (in some particular cases) restrain the tenant from committing waste, where it is dispunishable by law, either by the nature of his estate, or by express grant of *without impeachment of waste:* but where, by the agreement of the parties, the lease is made *without impeachment of waste*, equity will not restrain the lessee from cutting timber, ploughing, opening mines, &c., though such lessee shall be restrained from pulling down houses, defacing seats, &c. Hard. 96; 1 Chan. Rep. 13. 14, 106, 116; 2 Vern. 392, 711; 1 Salk. 161; 2 Chan. Ca. 32; 2 Chan. Rep. 94.

[A tenant for years, remainder to B for life, remainder to C in fee. A is doing waste. B, though he cannot bring waste, not having the inheritance, is yet entitled to an injunction. But if the waste be of a trivial nature,(*a*) and *à fortiori* if it be a meliorating waste, as by building on the premises, (see Co. Litt. 53,) the court will not enjoin; nor, if the reversioner or remainder-man in fee be not made a party, who possibly may approve of the waste.

Roswell's case, 1 Roll. Abr. 377. (*a*) Mollineux v. Powell, Pasch. 1730, *per* Ld. King; 3 P. Wms. 268, note F;] ‖Barry v. Barry, 1 Jac. & Walk. 651, *acc.*‖

‖ In some cases, the Court of Chancery will grant an injunction against mere permissive waste.

Caldwell v. Baylis, 2 Meriv. 408.

Where a tenant defending an ejectment at suit of his landlord makes default at the trial, and makes use of the interval to commit wilful waste, the court will grant an injunction against him in vacation; but it was refused where no ejectment was brought.

Lathrop v. Marsh, 5 Ves. 261;‖ β Kinsler v. Clarke, 2 Hill's Ch. 618.β

If A is tenant for life, remainder to B for life, remainder to the first and other sons of B in tail-male, remainder to B in tail, &c., and B (before the birth of any son) brings a bill against A to stay waste, and A demurs to this bill because the plaintiff had no right to the trees, and no one that had the inheritance was party; yet the demurrer will be overruled, because waste is to the damage of the public, and B is to take care of the inheritance for his children, if he has any, and has a particular interest himself, in case he comes to the estate.

Dayrel v. Champness, 1 Eq. Cas. Abr. 400.

On a motion for an injunction to stay a jointress, who was tenant in tail after possibility, &c., from committing waste, it was urged, that she being jointress within the 11th of H. 7, ought in equity to be restrained from cutting timber, that being part of the inheritance, which, by the statute, she is restrained from aliening; and the court granted an injunction against wilful waste in the site of the house, and pulling down houses.

1 Eq. Cas. Abr. 400, Cook v. Whaley; [Pr. Ch. 454, S. C.]

[On a bill to restrain a jointress *without impeachment of waste* from committing waste, a perpetual injunction was granted to restrain her and her agent from ploughing the pasture and meadow-lands of her jointure.

Bassett v. Bassett, Finch's Rep. 190.]

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But where a jointress had a covenant that her jointure should be of such a yearly value, which fell short, though her estate was not *without impeachment of waste;* yet the court would not prohibit her committing waste, so far as to make up the defect of her jointure. *But* quære *if an action of waste be brought against her, if Chancery will enjoin the action.*

Finch's Rep. 190, Carew v. Carew.

It seems to be a general principle, however, that—

Tenant in tail, after possibility, shall be restrained in equity from doing waste by injunction, &c., because the court will never see a man disinherited; *per* Chance, Finch. And he took a diversity where a man is not punishable for waste, and where he hath a right to do waste; and cited Uvedale's case, 24 Car. 1, ruled by the Lord Rolle to warrant that distinction.

2 Show. 69, pl. 53, Abraham v. Bubb. A woman, tenant in tail, after possibility of issue extinct, was restrained from committing waste in pulling down houses, or cutting down trees, which stood in defence of the house, and fruit trees in the garden; but for some turrets of trees, which stood a land's length or two from the court, would grant no injunction, because she had by law power to commit waste: and yet she was nevertheless restrained in the particulars aforesaid, because they seemed to be malicious, 2 Freem. 278, 279, pl. 349.

A devised lands, on which timber was growing, to his wife for life, remainder to B in fee, paying several legacies within a limited time, and in default of payment the remainder to C, he paying the legacies; and on a bill brought by B the court gave him leave to cut timber for the payment of the legacies, though it was opposed by the tenant for life and the devisee over, he making satisfaction to the widow for breaking the ground by carriage, waste, &c.

2 Vern. 152, Claxton v. Claxton.

So, where a man created a term for 500 years, in trust for himself and his wife for life, remainder to trustees for payment of debts and annuities; and by will devised the reversion thereof to A for life, without impeachment of waste, remainder to his first and other sons in tail-male, with remainder over; A being in want, the court gave him leave to cut down timber to the value of 500*l.* though the debts and annuities were not paid; the trustees having no power to sell the timber, the debts being like to have a long continuance, and there being a great deal of decaying timber on the estate.

2 Vern. 218, Assimwall v. Leigh et al.

[A tenant for life, remainder to B his son in tail, remainder to C for life, with remainders over. A files a bill in his own name and that of B his son, then an infant, stating (*inter alia*) that there were great quantities of timber upon the estate going to decay, and praying that he (A) might be empowered to cut down and sell such timber as was decaying or at its full growth, for the benefit of B. The defendants by their answers admitted that there were several trees in a state of decay, and that it would be for the benefit of all persons interested in the premises to have them cut down. It was decreed, that the Master should inquire what timber was standing upon the estate that was in a decaying condition, which was neither a shelter nor ornament to the seat, and that such decaying timber as the Master should direct should be cut down and sold, and the produce of the sale invested, upon proper security, in the names of trustees for the benefit of B, the infant, to be paid him when he came to age.

Bewicke v. Whitfield, 3 Cox's P. Wms. 266. In this case it is to be observed, the

tenant for life was a co-plaintiff with the remainder-man in tail, and claimed no benefit from the sale of the timber. But supposing a contract to be entered into between the tenant for life and remainder-man to share in the profits of the sale, (which seems not to be unreasonable, for no timber can be cut without the consent of the tenant for life,) could the court in that case authorize the cutting down of the timber? For if the remainder-man in tail were to die before his estate vested in possession, the rights of the person next in remainder would be varied. Where, therefore, the court had authorized the cutting down of timber on the estate of an infant tenant in tail in remainder, and the tenant for life claimed a life-estate in the money produced by the sale, Lord Commissioner Eyre said, he thought the court had done wrong in doing for the tenant in tail what he could not do for himself, and the money was ordered to be invested in the funds, that when the infant came of age, the claims of the parties might be discussed in a bill. Mildmay v. Mildmay, 4 Bro. Ch. R. 76. It is, however, a rule, that the money raised by the sale of timber cut down by tenant for life, impeachable of waste, shall be paid to him who has the first estate of inheritance, whether in fee or in tail; and this, though there may be several intermediate remainders that may arise. Lee v. Alston, 3 Bro. Ch. R. 37. But yet, where the tenant for life has also in himself the next existent estate of inheritance, subject to intermediate contingent remainders, he shall not take advantage of his own wrong in cutting down timber, but the court will preserve it for the benefit of the contingent remainder-men. Williams v. Duke of Bolton, Feb. 24, 1784, 3 Cox's P. Wms. 268, note (1).

In general, an injunction will not issue where the persons applying for it are tenants in common with the person in possession; for he has an equal title to the possession with them, and they may have a partition against him. However, where it appeared that the person in possession was insolvent, and could not pay the plaintiffs their share of the money produced by the sale, Lord Chancellor granted the injunction.

Smallman v. Onions, 3 Bro. Ch. R. 621.]

|| The general rule is, that the court will not grant an injunction against a tenant in common, to stay mere equitable waste, though malicious destruction may be a ground for an injunction; and where one tenant in common becomes tenant of the other moiety, the court will restrain him from ploughing up meadow or cutting timber; since, by becoming tenant, he engages, as to one moiety, to treat the land as a tenant ought to treat it.

Hole v. Thomas, 7 Ves. 589; Twort v. Twort, 16 Ves. 130; *sed* vide 8 Term R. 145.||

β In Pennsylvania, the writ of estrepement of waste does not lie of course, but must be grounded on an affidavit of actual waste, done or permitted.

Dickinson v. Nicholson, 2 Yeates, 281.

Chancery only interferes to prevent future waste, except where there are some special grounds for equitable interference as to waste already committed.

Winship v. Pitts, 3 Paige, 259.

On a bill with proper allegations filed, the chancellor will restrain waste.

Downing v. Palmateer, 1 Monr. 65.g

In what Cases Waste may be restrained in Equity, notwithstanding the Words without Impeachment of Waste, *be contained in the Lease, &c.*

It is true that a lease *without impeachment* of waste takes off all restraint from the tenant of doing it; and he may in such case pull up, or cut down wood or timber, or dig mines, &c., at his pleasure, and not be liable to any action.

Plowd. 135. [At common law, the clause, *without impeachment of waste*, only

exempted the tenant for life from the penalty of the statute, the recovery of treble value, and the place wasted, not giving the property of the thing wasted. But in Lewis Bowle's case, 11 Co. 79, it was determined, that these words also gave the property; the necessary consequence of which was, that in general, unless on particular circumstances, he was not to be restrained in equity; for that would be to determine that he should not make use of that property which the law allowed him. But afterwards several instances were considered, in which this very large power might be exercised contrary to conscience and in an unreasonable manner by the tenant for life; as where his act was to the *destruction* of the thing settled; which was the ground of Lord Bernard's case, the strongest that could happen: yet that was not an original case without precedent or judicial opinion to support it, as appears from a case 5 Jac. 1, (before Lewis Bowle's case,) which probably occurred then, though the determination there did not operate upon it. *Per* Lord Hardwicke, 1 Ves. 265.]

But though the tenant may let the houses be out of repair, and cut down trees, and convert them to his own use: yet, where a tenant in fee-simple made a lease for years *without impeachment of* waste, it was adjudged, that the lessor had still such a property, that if he cut and carried away the trees, the lessee could only recover damages in an action for the trespass, and not for the trees: Also it hath been held, that tenant for life, without *impeachment of waste*, if he cuts down trees, is only exempt from an action of waste, &c.

11 Rep. 82; 1 Inst. 220; 2 Inst. 146; 6 Rep. 63; Dyer, 184.

And if the words are, *To hold without impeachment of any writ or action of waste*, the lessor may seize the trees, if the lessee cuts them down, or bring trover for them.

Wood's Inst. 74.

In many cases, likewise, the Court of Chancery will restrain waste, though the lease, &c., be made *without impeachment of waste*. For,

The clause of *without impeachment of waste*, never was extended to allow the very destruction of the estate itself, but only to excuse for *permissive waste*, and therefore such a clause would not give leave to fell or cut down trees ornamental or sheltering of a house, much less to destroy or demolish a house itself. Thus—

A bill was brought by a remainder-man to restrain the tenant for life, without impeachment of waste, from cutting timber in Westwood Park improper to be felled; and Lord Chancellor granted the injunction to restrain the defendant from cutting timber, which served for shelter or ornament to the house, or which grew in lines, avenues, or ridings for ornament, and also any other timber in the park, which was not of proper growth to be felled.—And his lordship in this case declared, that courts of equity had in this respect established rules much more restrictive than those of the common law; which gave tenant for life, without impeachment of waste, as large a power over the timber as tenant in fee-simple, that timber might be had for public use.

MS. Rep. in Chanc. 1744, Packington v. Packington; [3 Atk. 215, S. C. In this case the plaintiff alleged, that the defendant, Sir H. Packington, had cut down *a great number* of trees, and had *threatened* to cut down and destroy them *all:* that Sir H. Packington's agent had agreed for the sale of 2000 trees, and that in consequence thereof *some* trees had been actually felled. It does not appear from the allegations of the plaintiff upon moving for the injunction, whether the agent had admitted this fact. Sir H. Packington's answer was not come in. Lord Hardwicke granted the injunction to restrain Sir H. Packington, his agents, servants, and workmen, from cutting down timber trees growing in Westwood Park aforesaid, which were for the *shelter* or *ornament* of the said mansion-house there; and also any timber trees, which were planted or grew in any *lines, avenues, or ridings for the ornament of the said park, until the said*

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Sir H. Packington should fully answer the plaintiff's bill. Reg. Lib. B. 1744, fol. 325. {6 Ves. J. 419, Lord Tamworth v. Lord Ferrers; 8 Ves. J. 70, Williams v. M'Namara. The cutting of clumps of firs planted for ornament on a common at the distance of two miles from the house will in like manner be restrained. 6 Ves. J. 197, Marquis of Downshire v. Lady Sandys.} ‖See Coffin v. Coffin, Jacob, 70, and 6 Madd. 17.‖

Likewise, where A upon his marriage settled lands to the use of himself and M his wife, and the heirs of their two bodies; afterwards A died without issue, M married D the defendant, being then tenant in tail after possibility of issue extinct: and M and D having felled some trees in a grove that grew near, and was an ornament to the mansion-house, and having an intention to fell the rest; the plaintiff, to whom the lands belonged in remainder, brought his bill to restrain M from felling those trees, and to have an injunction to stay the committing of waste. This cause was referred, and if the parties could not agree, then to be set down again. But Lord Chancellor Nottingham discovered his inclination *fortiter* for granting an injunction.

2 Freem. Rep. 53, Abraham v. Bubb. ‖See S. C., 2 Show. 69; 2 Eq. Ca. Ab. 757, and Lord Nottingham's MSS. 2 Swanst. R. 172. This case was decided by Lord Nottingham on the reasons of Skelton v. Skelton, (see 2 Swanst. 170, *notâ*;) and according to the report in 2 Freem. his lordship gives again most of the reasons and cases which are stated in his MSS. of the decision of Skelton v. Skelton; and see 3 Swanst. 493, *notâ*.‖ His lordship said, if there be tenant for life without impeachment of waste, and he goes to pull down the houses, &c., to do waste maliciously, this court will restrain, although he hath express power by the act of the party to commit waste; for this court will moderate the exercise of that power, and will restrain extravagant humorous waste, because it is *pro bono publico* to restrain it; and he said he never knew an injunction denied to stay the pulling down of houses by tenant for life without impeachment of waste, unless it were to Serjeant Peck in Lord Oxford's case, ‖cited Cro. Eliz. 777,‖ and said, he believed he should never see this court deny it again. Freem. 54.

So, where a lease was made by a bishop for twenty-one years, *without impeachment of waste*, of land that had many trees upon it, and the tenant cut down none of the trees till about half a year before the expiration of his term, and then began to fell the trees; the court granted an injunction; for though he might have felled trees every year from the beginning of his term, and then they would have been growing up again gradually, yet it is unreasonable that he should let them grow till towards the end of his term, and then sweep them all away: for though he had power to commit waste, yet this court will model the exercise of that power.

2 Freem. 55; ‖ and see the report from Lord Nottingham's MSS., 2 Swanst. R. 172, Lady Evelyn's case cited. Ibid.

So, in the case of tenant for life, remainder to the first son for life *without impeachment of waste*, with remainder over, the first son, by the leave of the lessee of tenant for life, comes upon the land, and fells the trees, although he could not in that case be punished by an action of waste, yet he was enjoined by this court.

2 Freeem. 55; ‖and see 3 Swanst. 699.‖

Likewise, where A on the marriage of his eldest son, in consideration of 10,000*l.* portion, settled (*inter alia*) Raby Castle on himself for life, *without impeachment of waste*, remainder to his son for life, and to his first and other sons in tail-male; afterwards, having taken some displeasure to his son, he got 200 workmen together, and of a sudden stripped the castle of the lead, iron, glass, doors, and boards, &c., to the value of 3000*l.*; the court, on the son's filing his bill, granted an injunc-

tion to stay the committing of waste in pulling down the castle, and upon hearing the cause, decreed not only the injunction to continue, but that the castle should be repaired, and put in the same condition it was in; and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the charge and expense of the father, and the son to have his costs.

2 Vern. 738, 739; 1 Salk. 161, S. C., Vane v. Lord Bernard.

A bishop of London, in Edward the Sixth's time, made a long lease, of which there were about twenty years to come, and the lease was made *without impeachment of waste;* W, in whom by several mesne assignments the remainder of this lease was vested, articled with brick-makers, that they might dig and carry away the soil of twenty acres six feet deep, provided they did not dig above two acres in the year, and levelled those acres before they dug up others. The (now) bishop of London having the inheritance in right of his bishopric, brought a bill to enjoin the digging of the ground for brick: Lord Chancellor Parker directed, that W might carry off the brick he had dug, but ordered an injunction to stop further digging.

1 P. Wms. 527, Bishop of London v. Webb. His lordship said, that before the statute of Gloucester, waste did not lie against lessee for years, and the being *without impeachment of waste* seems originally intended only to mean that the party should not be punishable by that statute, and not to give a property in the trees or materials of a house pulled down by lessee for years *sans waste;* but he said, that the resolutions having established the law to be otherwise, he would not shake it, much less carry it further, and that he took this case, the Bishop of London v. Webb, to be within the reason of Lord Bernard's case; where, as he was not permitted to destroy the castle to the prejudice of the remainder-man, so neither shall the lessee in the present case destroy this field against the bishop, who has the reversion in fee, to the ruin of the inheritance of the church. Ibid. 528, 529.

[A very considerable real estate was limited to Mrs. Rolt, who afterwards married the defendant, the Lord Somerville, for life, without impeachment of waste, remainder to the plaintiff Rolt for life, without impeachment of waste, with several remainders over. The defendant, the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and out-buildings upon the estate, and sold them, and also took up lead water-pipes, that were laid for the conveyance of water to the capital messuage, and disposed thereof; and he also cut down several groves of trees that were planted for shelter or ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition it was in before. The defendant demurred, and insisted that this waste was committed by tenant for life without impeachment of waste, and therefore he was not liable to be called to an account for what he had done either at law or in equity; and if he was, yet the plaintiff could not call him to an account, because he was not a remainder-man of the inheritance. Lord Hardwicke,—Though an action of waste will not lie at law for what is done to houses, or plantations for ornament or convenience by tenant for life, without impeachment of waste, yet this court hath set up a superior equity, and will restrain the doing of such things on the estate. In Lord Bernard's case the court restrained him from going on, and ordered the estate to be put in the same condition. In Sir Blundel Charleton's case, the Master of the Rolls decreed, that no trees should be cut down that

were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down; for if this bill had been brought before such trees (*a*) had been cut down as were for the ornament or shelter of the estate, this court would have interposed: but here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber, which is a damage to the inheritance; yet, as to pulling down the houses and buildings, and taking up the lead pipes, that may be restored, or put in as good condition again. In my Lord Bernard's case, there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his lifetime. The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.

Rolt v. Lord Sommerville, 2 Eq. Ca. Abr. tit. *Waste*, (A), pl. 8. (*a*) Even where a son, tenant in tail, brought a bill against his father tenant for life, without impeachment of waste, charging waste in pulling up a *deal floor*, removing some young oaks, and turning meadow into plough land, but did not apply for an injunction, the bill was dismissed. Piers v. Piers, 1 Ves. 521. For the ground of going into a court of equity is to stay the waste, not by way of satisfaction for the damages, but by way of prevention of the wrong. The account is only incident to the preventive jurisdiction by injunction, and is given upon the maxim of preventing a multiplicity of suits, that the party may not be obliged to proceed both at law and in equity. The court therefore have refused to entertain a bill merely for satisfaction for timber cut down after the estate of the tenant who cut it down was determined, no injunction having been prayed. Jesus College v. Bloom, 3 Atk. 262.

Sir T. A., in the same settlement in which he made himself tenant for life without impeachment of waste, with full liberty to commit waste, settled a jointure upon his wife for life, without impeachment of waste. On settling another part of his estate, he created a term on trust to secure a rent-charge of 300*l.* *per annum* to his wife, as a further part of her jointure, and afterwards out of the rents and profits thereof to raise money from time to time, to reimburse her expenses in sustaining and repairing her jointure estate. A bill was brought by the daughter of Sir T. A. after his death and the death of her brother without issue, against her mother, to enjoin her from committing spoil and destruction on her jointure estate, and for satisfaction for the damage done thereby; suggesting that she had cut down even such timber as was not fit for repairs, and young saplings, &c., leaving not a twig on the estate. Lord Hardwicke, upon the general ground, considering the question merely as it concerned tenant for life without impeachment of waste under a settlement, seemed to think that the court could not interpose to prevent such a tenant from cutting down timber in an improper state. But, on the special circumstances of the case, his lordship expressed himself to this effect,—This settlement is all in the settler's own handwriting, who does not appear to have been a lawyer; and though a counsel was said to be employed, there is no evidence thereof. It is natural to suppose, that from the variety of expressions in the additional words to the clause, wherein he makes himself tenant for life, he thought there was some difference. Besides, the term for his wife's reimbursement is extraordinary; and it is absurd to suppose he meant to leave her at liberty to cut down and strip the estate of every stick of timber, (which are the natural *botes* for repairs,) and then to come by this term to be reimbursed her expenses in buying timber of repairs: it is contrary to the plain intent, which was that she should be tenant for life without impeachment

of waste, to prevent trouble in little matters; but that she should be reimbursed out of this term what she should pay out of her own pocket. Therefore, as the defendant has cut down timber on this estate without applying it to repairs, she shall have no benefit of this term, till she has reimbursed to the estate what she has so unreasonably cut away; and as to the future, the evidence being, that she has left no timber fit even for the repair of farm-houses, I shall restrain her by the decree from cutting any more timber off the estate without leave of the court.

Aston v. Aston, 1 Ves. 264.

T D devised his real estates, situate at C, W, and B, to his wife, the defendant, for life, remainder to E H for life, remainder to the plaintiff in fee. Just before his death he added two codicils, the last of which, and the material one in the present question, was in these words:—"Whereas I have devised my estates by my last will and testament, as therein mentioned, and my dear wife has no power to cut down any timber; now *I give unto my said wife for and during so long time as she shall continue my widow, full power and authority to cut timber upon any part of my estate, for her own use and benefit, at all seasonable times of the year.*" The defendant, under this power, made contracts for, and began to fell timber; whereupon the plaintiff filed his bill against her, charging, that she had cut down a great many trees that had been planted for shelter and ornament to the mansion-houses, and which stood in the lawns, gardens, and pleasure-grounds belonging to the testator, and also great numbers of saplings, and timber trees unfit to be cut, and praying an account of the timber so cut, and satisfaction for the same, and an injunction to restrain the defendant from committing waste and destruction upon the estates. The defendant in her answer admitted, that she had cut down several trees in the lawns and pleasure-grounds, but insisted that it was for the improvement of the place, by widening the passages, and preventing damps; she also alleged, that oak and ash trees of such a dimension were accounted timber trees, and that she had cut down none under such sizes. An injunction,(*a*) however, was granted to restrain her from cutting trees which were saplings, and not proper to be cut as timber. The defendant afterwards intermarried, and the cause coming on to be heard,(*b*) Lord Chancellor was pleased to direct a trial at law upon the following issue, viz., Whether the defendant had cut any trees or other timber which had been placed, or designedly left for the ornament or shelter of the mansion-house, gardens, and pleasure-grounds at C and at W; and also, whether she had cut any saplings or young trees down which are not proper to be felled as timber, and what damage had been sustained thereby.

Chamberlyne v. Dummer, 1 Bro. Ch. Rep. 166. (*a*) The injunction was said to issue nearly in the terms of that of Obrien v. Obrien, 20th May, 1751, which was, to restrain the defendants from cutting any timber trees or other trees growing upon the estates, which were planted or growing there for the ornament or shelter of the mansion-house, or that grew in vistas, planted walks, or lines, for the ornament of the park part of the estate, and also from cutting down any saplings growing on any part of the estate not proper to be felled, till answer or further order. (*b*) 3 Bro. Ch. Rep. 549.

‖ Cutting timber where necessary for the growth of underwood is not waste.

Burges v. Lamb, 16 Ves. 179.‖

A bill was filed by the eldest son, tenant in tail, expectant on the death of the father, tenant for life, to restrain the father from committing waste,

(N) Where Waste may be restrained by Injunction.

by cutting down timber, especially such as was ornamental to the house. The court, upon affidavit, and certificate of the bill filed, granted an injunction to restrain the defendant from committing waste upon such part of the estate, whereof he was subject to impeachment for waste, and as to the mansion-house, out-houses, gardens, and orchards, timber growing for ornament and shelter to the house, to restrain him from committing waste therein till answer or further order.

Leighton v. Leighton, 22d March, 1747–8, 1 Bro. Ch. Rep. 167.]

‖ There has been much uncertainty as to what is, and what is not to be considered ornamental timber. The principle on which the court has gone is, that if the testator, or author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties, the court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the court.

Per Lord Eldon, 6 Ves. 149; and see *acc.* Lushington v. Boldero, 6 Madd. 149.

And, therefore, it is not enough for the affidavits to ground an injunction to show that the trees *are* ornamental. It must be shown that they were planted or left standing for the purpose of ornament.

Coffin v. Coffin, Jacob, 70.

The principle has been extended from ornament of the house to out-houses and grounds, then to plantations, vistas, avenues, and all the rides about the estate for ten miles round: and in the case of the Marquis of Downshire v. Sandys, it was held to extend to clumps of firs on a common two miles distant from the house, they having been planted for ornament.

Marquis of Downshire v. Sandys, 6 Ves. 107; and see Tamworth v. Ferrers, 6 Ves. 419; Davis v. Leo, Ibid. 787.

And the court granted the injunction where the trees were planted to exclude objects from view; holding this case within the principle.

Day v. Merry, 16 Ves. 375; and see Burges v. Lamb, Ibid. 174.

But the injunction will not be extended to trees which protect the premises from the effects of the sea. And the court refused in one case to insert in the order the words "contributing to ornament," and the injunction was accordingly taken according to Chamberlyne v. Dummer (*suprà*) in the terms "*standing for ornament or shelter.*"

Coffin v. Coffin, Jacob, 70; Williams v. Macnamara, 8 Ves. 70; and see Jacob, 71, *notâ.*‖

β A was tenant for life without impeachment of waste, except as to "the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage;" he cut timber in woods not precisely answering to that description, but which were an ornament or shelter to the messuage. Held that he was guilty of equitable waste, and an account was directed and injunction granted.

Newdigate v. Newdigate, 2 Clark. & Fin. 601.g

[Lands were devised to trustees to be sold, and the money to be laid out in the purchase of other lands, which, when purchased, were to be set-

tled to the use of A for life, without impeachment of waste, remainder over. The rents and profits of the lands to be sold were directed to be, till sale, to the use of the same persons who would be entitled to the lands that were to be purchased. It was decreed that A, the tenant for life, could not cut down timber on the lands that were directed to be sold.

Countess Dowager of Plymouth v. Lady Archer, 1 Bro. Ch. Rep. 159.

Although, as appears from the above cases, an injunction will issue to prevent a tenant for life *without impeachment of waste* from committing improper waste, yet if the answer deny any intention of doing so, be not excepted to, and be full, the order for the injunction will be discharged.

Countess of Strathmore v. Bowes, 2 Bro. Ch. Rep. 88.]

|| The act of sending a surveyor to mark out trees is a sufficient threatening of waste to be a ground for an injunction.

Jackson v. Cator, 5 Ves. 688.||

(O) What Relief may be given in Equity, in Cases of Waste.

A BILL was brought to restrain tenant in dower from getting peat: Lord Chancellor dismissed it with costs, as it appeared to be vexatious; the peat she sold not being above the value of ten pence. But herein it was said, that digging peat is in many places the ordinary bote; and perhaps the only fruit that can arise from the land. They do not carry away the soil, for they dig off the turf, then take away the peat, and lay the turf down again: and tenant for life can no more dig peat to sell than cut down timber to sell; and the Chancellor said, if he was to give any relief, he must direct an issue; but that the cause was of too frivolous a nature to maintain the expense.

MS. Rep. Wilson v. Bragg, 3 March, 1742.

A bill being brought to redeem a mortgage, on the hearing, an account was decreed, and 240*l.* reported due; to which report the plaintiff had taken exceptions. The cause thus standing in court, the Lord Keeper, on a motion, and reading affidavits that the defendant had burnt some of the wainscot and committed waste, ordered the defendant to deliver up possession to the plaintiff, who was a *pauper*, giving security to abide that event of the account.

2 Vern. 392, Hanson v. Derby.

A tenant for life, remainder to trustees to preserve, &c., remainder to C the plaintiff in tail, remainder over, with power to A with consent of trustees to fell timber, and the money arising to be vested in lands, &c., to same uses, &c. A felled timber to the value of 3000*l.* with consent of trustees, who never intermeddled, and A had suffered some of the houses to go out of repair. C by bill prayed an account and injunction. The Master of the Rolls said, that the timber might be considered under two denominations, to wit, such as was thriving and not fit to be felled; and such as was unthriving, and what a prudent man and a good husband would fell, &c., and ordered the Master to take an account, &c. And the value of the former, which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid according to the settlement, &c. But as to repairs, the court never interposes in case of *permissive waste*, either to prohibit or give satisfaction, as it does in case of *wilful waste;* and where the court have jurisdiction of the principal, viz., the prohibiting, it does in

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consequence give relief for waste done, either by way of account, as for timber felled, or by obliging the party to rebuild, &c., as in case of houses, &c., and mentioned Lord Bernard's case as to Raby Castle. 2 Vern. But as to repairs, it was objected, that the plaintiff here had no remedy at law by reason of the mesne estate for life to the trustees, between plaintiff's remainder in tail, and defendant's estate for life, and that therefore equity ought to interpose, &c., and that this was a point of consequence. *Sed non allocatur.*

MS. Rep. Mich. Vac. 1733, Lord Castlemain v. Lord Craven.

A lord of a manor may bring a bill for an account of ore dug, or timber cut, by the defendant's testator.—Thus,

A customary tenant of lands, in which was a copper mine, that never had been opened, opened the same, and dug out and sold great quantities of ore, and died; and his heir continued digging and disposing of great quantities out of the said mine. The lord of the manor brought a bill in equity against the executor and heir, praying an account of the said ore; and alleged that these customary tenants were as copyhold tenants, and that the freehold was in the plaintiff as lord of the manor and owner of the soil; and that the manner of passing the premises was by surrender into the hands of the lord, to the use of the surrenderee. It was insisted for the defendants, that it did not appear that the admittance, in this case, was to hold *ad voluntatem domini secundum consuetudinem*, &c., without which words, it was insisted, there could be no copyhold, as had been adjudged in L. Ch. J. Holt's time. And L. C. Cowper said it would be a reproach to equity to say, that where a man has taken another's property, as ore, or timber, and disposed of it in his lifetime, and dies, there should be no remedy.

1 P. Wms. 406, Bp. of Winchester v. Knight. But his lordship said, in this case, that as to the trespass of breaking up meadow or ancient pasture-ground, it dies with the person. Ibid. ‖See Richards v. Noble, 3 Meriv. 673.‖

‖ And in a late case, Sir Thomas Plumer, V. C., overruled a demurrer to a bill against the representative of a tenant for life, for an account of equitable waste committed by him, and for relief, on the principle that, where equitable waste has been committed, the court has jurisdiction to make the representative of the party committing it accountable.

Lansdown v. Lansdown, 1 Madd. 141.‖

Converting a brewhouse into tenements of a greater value, is waste, notwithstanding the melioration, by reason of the alteration of the nature of the thing and of the evidence; and so resolved on a trial before Hale, C. J., and the jury gave the verdict accordingly, and 100 marks single damages, which being trebled amounted to 200*l.*, which the Chancery compelled Cole to take.

Lev. 311, Cole v. Green.

Lessee for 500 years of land, about 200*l.* a year, built several houses, and thereby improved the rents from 200*l.* a year to 1400*l.* a year, and quietly enjoyed the same for twenty years and more, and then an action of waste was brought for pulling down a brick wall, and cutting down fruit trees, and digging gravel for laying the foundations of the houses built on the said ground. He brought a bill setting forth, that such building could not be accounted any waste, but rather a melioration and improvement of the land. The defendant pleaded the statute, by which provision is made

for bringing actions of waste. But the court overruled the plea, and ordered the defendant to answer and to speed the cause.

Fin. Rep. 135, Wild v. Sir Ed. Stradling.

An under tenant of a jointress commits waste *sparsim*, so as at law the estate was forfeited, but insisted that he had improved the estate from 40*l.* to 60*l. per annum*, and offered to take a lease of it at that rent for 50 years, and to answer the value of the timber on a *quantum damnificatus*. *Quære.*

2 Vern. R. 263, pl. 247, Ligo v. Smith and Leigh.

One seised in fee of lands in which there were mines, all of them unopened, by a deed conveyed those lands, and all mines, waters, trees, &c., to trustees and their heirs, to the use of the grantor for life, (who soon after died,) remainder to the use of A for life, remainder to his first, &c., son in tail-male successively, remainder to B for life, remainder to his first, &c., son in tail-male successively, remainder to his two sisters C and D and the heirs of their bodies, remainder to the grantor in fee. A and B had no sons, and C, one of the sisters, died without issue, by which the heir of the grantor as to one moiety of the premises had the first estate of inheritance: A having cut down timber and sold it, and threatened to open the mines, the heir of the grantor, being seised of one moiety *ut supra*, by the death of one of the sisters without issue, brought his bill for an account of the moiety of the timber, and to stay A's opening of any mine: and it was adjudged the right to this timber belongs to those who, at the time of its being severed from the freehold, were seised of the first estate of inheritance, and the property becomes vested in them.

2 P. Wms. 240, Whitfield v. Bewit. [It appears by Reg. Lib. B. 1723, fol. 576, that there were in this case trustees to preserve the contingent remainders, and the bill expressly stated applications to have been made to the heir of the surviving trustee, to interpose and put a stop to the commission of the waste, but that he refused to act.]

A bill was brought against the executors of a jointress to have a satisfaction out of assets for *permissive waste* upon the jointure of the testatrix, &c. But by Cowper, C., the bill must be dismissed; for here is no covenant that the jointress shall keep the jointure in good repair; and in the common case, without some particular circumstances, there is no remedy in law or equity for permissive waste after the death of the particular tenant.

Vin. Abr. tit. *Waste*, p. 523, cites MSS. Rep. 1 G. 1, *in Canc.* Turner v. Buck. ‖See 2 Meriv. 408.‖

‖Where the reversioner of leaseholds, with the privity of tenant for life, renewed the lease in his own name, and covenanted to repair the premises, Sir John Leach, V. C., held, that he was to be considered as having entered into the covenant on behalf of the tenant for life, and that the latter's estate was liable for dilapidations occasioned by his neglecting to repair.

March v. Wells, 2 Sim. & Stu. 87.‖

It has been said in equity, that a remainder-man for life shall, in waste, recover damages in proportion to the wrong done to the inheritance, and not in proportion only to his own estate for life.

1 Vern. 158, Brown v. Brown.

A being tenant for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder to B in tail; A and B before issue born of A fell timber. The eldest son of A afterward brings his bill for an account

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and satisfaction of the timber against B. *Per* Lord Ch.—The plaintiff has no remedy at law, either in his own name, or in the name of his trustees. A, if he had not consented to it, should have brought trespass; for tenant for years is considered as a fiduciary for the remainder-man or his lessor. If A had had an estate for life, and no limitation to trustees, the plaintiff could have had no remedy; because tenant for life might have barred, or surrendered the whole estate to the remainder-man; but here the freehold was in the trustees; and the possession of the lessee for years is in law the possession of the owner of the freehold. The trustees, however, could not here have maintained waste, because the common law gave no action of waste, but to the owner of the inheritance; and the statute of Gloucester gives the writ to the same person; but the trustee is in no other condition than a remainder-man for life. Trustees may bring a bill in equity to stay waste, before the contingent remainder comes *in esse*. If the trustees had brought such a bill, the court, as to trees actually cut, would have obliged them to have made satisfaction in money, to have been secured to attend the contingent uses. Where there is tenant for life or years subject to waste, and timber is blown down, the owner of the first remainder in tail vested shall have it; for the common law considers an estate in contingence as no estate: and when the tree is severed, the property vests in somebody. If there be tenant for life, remainder for life, remainder in fee, the remainder-man can have no action for waste, because the plaintiff must recover the place wasted, which would be injustice to the remainder over; but such a remainder-man of the inheritance after the intervening estate may have trover for the trees, and if remainder-man for life dies, in the life of remainder-man in fee, he may bring waste. Though an injunction is a proper remedy, yet it has never been determined that a bill for an account cannot be maintained afterward: and though a recovery was suffered after waste done, it was to the use of plaintiff and his heirs, which is no new use, and ought not to bar waste in equity. It is true the action of waste dies with the person; but though waste will not lie at law, as the person committing it is dead, yet he may have relief in this court. It is held, in all cases of fraud, the remedy never dies with the person, but relief may be had against the executor out of assets; and this court will follow the assets of the party liable to the demand; and collusion in this court is the same as fraud.—Decreed a satisfaction to be made to the plaintiff, for the value of the timber, as he is now tenant in fee of the estate; but would not give any interest, as that would be carrying it too far

MSS. Rep. Garth v. Cotton, 26 G. 2; [1 Ves. 524, 546, S. C.; 3 Atk. 751, S. C.]

[An estate was settled upon A, for her jointure without impeachment of waste, except in pulling down houses and felling timber, remainder to her son B for life, without impeachment of waste generally, remainder to trustees to preserve contingent remainders, remainder to his issue in tail, remainder to his sister C in tail. B in the lifetime of A, and with her privity, fells timbers upon the estate, and afterwards dies in her lifetime; whereupon C brought an action of waste against A, to recover treble damages, and the place wasted, and had a verdict. But it being proved that the timber was cut down with the knowledge of C, and that she encouraged the doing so, a perpetual injunction was granted to restrain her from proceeding any further at law.

Aston v. Aston, 1 Ves. 396.]

‖If a tenant for life has rendered accounts to the remainder-man of timber cut by him during a period more than six years before a bill is filed against him for an account of such timber, and of the value of it, the statute of limitations cannot be pleaded to the bill; for though, if the remainder-man had brought an action of trover, the defendant might, notwithstanding the accounts, have pleaded the statute, he could not have done so if an action of assumpsit had been brought.

Hony v. Hony, 1 Sim. & Stu. 568; and see Barry v. Barry, 1 Jac. & W. 651.

In the Exchequer it is a rule, that where any application shall be made for an injunction to stay waste, or in the nature of an injunction to stay waste, before the defendant is in court, supported by affidavit, such affidavit shall be filed, and the office copy thereof produced, with the necessary certificate of the bill being filed.

R. H. 1 & 2 Geo. 4, Exch. 9 Price, 88.‖

℔ A bill to stay waste should show a good, and not a doubtful title to the place wasted, or in which waste is apprehended; equity will not interfere for that purpose, when by possibility the plaintiff's claim, now confessedly uncertain, may turn out, upon evidence hereafter to be discovered, to cover a part of the land in which it is said the waste is contemplated.

Hough v. Martin, 2 Dev. & Bat. Eq. 379.℈

OF WILLS AND TESTAMENTS.

SEVERAL branches of these heads having been already treated of under the articles *Executors and Administrators*, and *Legacies and Devises*, little more remains than to consider what formal circumstances are necessary to the perfection of a will and testament, and by what means, and for what causes they may be avoided.

For the better understanding of these particulars, we will arrange the matter relative to the residue of this subject under the following divisions, and inquire,

(A) What is a *Will* and *Testament*, and wherein they differ.

(B) Who are capable of making a Will and Testament.

(C) What are the Requisites to constitute a good will.

(D) Of Wills in Writing:—And here,

I. *What shall be a good Will in Writing to pass Lands and Tenements, &c., Wherein,*

1. In what Language and Hand a Will may be written.

2. Of the Circumstances of Signing, Attestation, Publication, &c.

3. Of the Republication:—as what will amount to a Republication, and where a Republication will make a Devise good.

II. *What shall be a good Will in Writing of Goods and Chattels.*

III. *What shall be a sufficient Proof of a Will.*

(E) Of Nuncupative Wills.

(F) Of the Nature and Effect of a Will and Testament.

(A) What is a Will and Testament, and wherein they differ.

(G) How Wills, &c. may be construed. ‖General Rules of Construction. And herein,—Of the admissibility of extrinsic Evidence to explain them.‖

(H) How Wills may be avoided: Wherein,

1. *What shall be deemed a Revocation of a Will:—And herein,*

‖1. Of Revocations by cancelling, alterations, and subsequent testamentary Acts.

2. Of Revocations by subsequent contracts, changes of estate, and alterations in circumstances.‖

2. *Where a Will shall be set aside for Fraud, &c., and where Fraud is examinable.*

(A) What is a Will and Testament, and wherein they differ

A TESTAMENT is a just and complete declaration or sentence of a man's mind, or last will of what he would have to be done with his estate after his death.

Termes de Ley, *voc. Testament;* Swinb. part 1, § 2 and 4; Shep. Abr. part 4, *voc. Testament.* [*Testamentum est voluntatis nostræ justa* (id est, solennis et legitima) *sententia, de eo quod quis post mortem suam fieri velit.* l. 1. Modestin. lib. 2, Pandect.]

Or, according to some, a will is a declaration of the mind, either by word or writing, in disposing of an estate; and to take place after the death of the testator.

Carth. 38, Lea v. Lib. [*Alienatio in mortis eventum, ante eam revocabilis, retento interim jure possidendi et fruendi, est testamentum.* Grot. lib. 2, De Jure Belli ac Pacis, c. 6, n. 14.] A will shall have relation only to the testator's death, and not to the making, for till his death he is the master of his own will; and therefore the will of a papist in Ireland was held to be avoided by a subsequent statute made in that kingdom, which enacts, that the lands of papists there shall not be devisable, but descend in gavelkind. Vin. Abr. tit. *Devise,* (H. b,) p. 7.

It is in Latin called *testamentum*, i. e. *testatio mentis*, the witness of a man's mind; and to devise by testament, is to speak by a man's will what his mind is to have done after his death: and it is sometimes called a will, or last will, for these words are *synonyma*, and are indiscriminately used in our law. However, by the civil law, it is only said to be a testament when there is an executor(*a*) made and named in it; and when there is none, it is but a codicil only: for a codicil is the same that a testament is,(*b*) excepting that it is without an executor; and a man can make but one testament that can take effect, but he may make as many codicils as he will.

Carth. 38, Lea v. Lib; 1 Inst. 111; Swinb. part 1, § 5. [(*a*) Hence Vinnius gives the following as the most perfect definition of a testament: *Testamentum est suprema contestatio in id solenniter facta, ut quem volumus, post mortem nostram habeamus hæredem.* Comment. in Institut. lib. 2, c. 10. (*b*) The civilians define a codicil to be *ultima testati vel intestati voluntas minùs solennis:* for by the Roman law, there might be a codicil, whether the party died testate or intestate; and if he died testate, the codicil might either be precedent or subsequent to the testament: and in this case the validity of the codicil depended upon the validity of the testament; the codicil had relation to the date of the testament, and required to be confirmed by the testament. But the codicils of an intestate derived all their efficacy from themselves, stood in need of no confirmation, and were regarded only from the day on which they were made.

And by the common law, where lands or tenements are devised in writing, although there be no executors named, yet there it is properly called a last will; and where it doth concern chattels only, a testament.

1 Inst. 111.

(A) What is a Will and Testament, and wherein they differ.

He who makes the testament is called the testator; and when a man dies without a will, he is said to die *intestate*.

Shep. Abr. part 4, *voc. Testament.*

A testamentary schedule without witnesses or an executor, has been declared a will.

2 Ld. Raym. 1282, Powell v. Beresford.

[So, a writing purporting to be an indenture, but by the party making it declared to be his will, has been considered as a testamentary instrument.

Hickson v. Witham, Finch. R. 195.]

{An endorsement upon a note "I give this note to A" may be proved as testamentary.

4 Ves. J. 565, Chaworth v. Beech. See 5 Ves. J. 354, Eden v. Smyth.}

β Although a writing be called a deed, and the party has been advised to make a deed, yet, if the operation and structure of the writing show it to be testamentary, made with a view to the disposition of a man's estate upon his death, it will enure as a will.

Henry's Executors v. Ballard, 2 Car. L. Repos. 595. See Millege v. Lemar, 4 Desaus. 617.

A paper writing executed by two persons, making a joint disposition of their property, after their death, cannot be admitted to probate as a conjoint or mutual will; and it cannot operate or be proved as the separate will of either of them, because it purports to be a joint and not a separate will, and because it implies, from its structure, an agreement between them, which is inconsistent with revocability, and it therefore prevents its operation as a will.

Clayton v. Liverman, 2 Dev. & Bat. 558.

A paper containing some technical expressions which might embrace the idea of a testamentary disposition of property, was not considered in the nature of a will, because the acts to be done by the persons named in it, were to be executed as speedily as possible, and in the lifetime of the maker.

Hamilton v. Peace, 2 Desaus. 92.

A B being about to sail for the West Indies, where he afterwards died, addressed a letter to C D, containing the following clause: "A thousand accidents might occur to me, which might deprive my sisters of that protection which it would be my study to afford; and in that event, I must beg that you will attend to putting them in possession of two-thirds of what I may be worth, appropriating one-third to Miss C and her child, in any manner that may appear most proper." Held, to be a valid will, especially after it had been proved as the last will of A B before the surrogate, and administration with the will annexed had been granted by him: held also, that C and her son were each entitled to a moiety of one-third of the personal estate of the testator, in the hands of the administrator.

Morell v. Dickey, 1 Johns. Ch. 153.

The court rejected a paper of instructions, signed by the testatrix, as the one referred to in the will duly attested, the paper itself not having been attested nor produced to the witnesses.

Sotheron, in the goods of, 2 Curt. 831.g

(B) Who are capable of making a Will and Testament.

An infant, until he be of the age of twenty-one years, can make no will of his lands by statute of 32 & 34 H. 8. But by special custom in some places, where land is devisable by custom, he may devise it sooner; and of his goods and chattels, if he be a boy, he may make a will at fourteen years of age, and not before; and if a maid, at twelve years of age, and not before: and then they may do it without and against the consent of their tutor, father, or guardian.

32 H. 8, c. 1, and 34 H. 8, c. 5; Swinb. part 11, § 2; β Williams v. Baker, 2 Car. L. Repos. 599; γ ‖Rob. Gav. 225;‖ β West v. West, 10 S. & R. 446.γ

If he or she hath attained to the last day of fourteen or twelve years, the testament by him or her in the very last day of their several ages aforesaid, is as good and lawful as if the same day were already then expired.

32 H. 8, c. 1, and 34 H. 8, c. 5.

Likewise, if, after they have accomplished these years of fourteen or twelve, he or she do expressly approve the testament made in their minority, the same by this new will and declaration is made strong and effectual.

Swinb. part 11, § 2.

And yet some say an infant cannot make a will of his goods and chattels until he be eighteen years of age.

1 Inst. 89 b. [The doctrine above stated, that the testamentary power commences in males at fourteen, and in females at twelve, seems to be the most relied upon. Vide Hargrave's edit. of Co. Litt. 89 b, note (*b*).] {11 Ves. J. 11.}

It has, however, been agreed in equity, that a female may make a will at twelve years of age of a personal estate, and a male at seventeen years of age, or fifteen,(*a*) if he be a person of discretion.

2 Vern. 469. [(*a*) This is a very loose *dictum*, entitled to no attention.] ‖If there be a local custom, that lands within a certain precinct shall be devisable by all manner of persons at fifteen, it is good. Rob. Gav. 225. That a boy of fourteen may make a will of chattels, see Ex parte Holyland, 11 Ves. 11.‖

A feme covert cannot make a will of her lands and goods, except it be in some special cases: for of her lands she can make no will with or without her husband's consent, stat. 32 & 34 H. 8; 4 Rep. 51; Bro. *Testament*, 13. But of the goods and chattels she has as executrix to any other, she may make an executor without her husband's consent; for if she does not so, the administration of them must be granted to the next of kin to the deceased testator, and shall not go to the husband.

12 H. 7, c. 24; Perk. § 502; Fitz. Exec. 40; {2 Day, 163, Fitch v. Brainerd.} β See Harvey v. Smith, 1 Dev. & Bat. 186; Newberryport Bank v. Stone, 13 Pick. 420.γ

β A will executed by a feme covert devising real estate to her husband is void.

Fitch v. Brainerd, 2 Day, 163.γ

But even of them she can make no devise with or without her husband's leave, for they are not devisable; and if she devise them the devise is void.

Plowd. 526.

Of the things due to the wife, whereof she was not possessed during the marriage, as things in action, and the like, she may make her will, at least she may make her husband executor of her *paraphernalia*, viz., her necessary wearing apparel, being that which is fit for one of her rank. Some say

she may make a will without her husband's leave, others doubt of this; however all agree, that she, and not his executor, shall have this after her husband's death; and that the husband cannot give it away from her; and of the goods and chattels her husband has either by her or otherwise, she may not make a will without the license and consent of her husband first had so to do: but with his leave and consent she may make a will of his goods, and make him her executor if she will. And it is said also, that if she does make a will of his goods in truth without his leave and consent, and after her death he suffers the will to be proved, and delivers the goods accordingly, in this case the testament is good: and yet if the husband gives the wife leave to make a will of his goods, and she does so, he may revoke the same at any time in her lifetime, or after her death, before the will is proved. But a woman after a contract with any man, before the marriage, may make a will as well as any other, and is not at all disabled hereby.

12 H. 7, 24; 18 Ed. 4; 11 Perk. § 501; Fitz. Exec. 5, 28, 109; Bro. *Test.* 11

‖The simple assent of her husband may give effect to the wife's disposition by will of her personalty, as against her nearest of kin; but such post-nuptial consent will not qualify her to dispose by will of her real estate to the disappointment of her heir. And if her disposition by will of her personal property emanate from the bare assent of her husband, it is necessary to its effect that the husband shall survive the wife; for the operation of such consent consists in its being a waiver by the husband of his right to administer to his wife, so that if he dies before his wife the will is void against her next of kin.

Stevens v. Bagwell, 15 Ves. 156; and see Scammell v. Wilkinson, 2 East, 552; Rob. on Wills, 27. ℘ See as to the assent of the husband, Smellie's Executors v. Reynolds, 2 Desaus. 66; Cassel's Administrator v. Vernon, 5 Mason, 332; Grimke v. Grimke's Executors, 1 Desaus. 366; Bradish v. Gibbs, 3 Johns. Ch. 523; Anderson v. Miller, 6 J. J. Marsh. 573.℘

When personalty of any kind is settled upon a married woman, whether by a contract to which her husband is a party, or by the settlement or gift of other persons, she has the same power over it in equity as if she were a single woman, without any express provision to that effect; for courts of equity consider, if she takes personal property for her separate use, she takes it with all its incidents, of which the *jus disponendi* is obviously one.

Fettiplace v. Gorges, 1 Ves. jun. 46; Rich v. Cockell, 9 Ves. 376.‖

Likewise, a wife, whose husband is banished by act of parliament for life, may make a will as a feme sole.

2 Vern. 104.

A mad or lunatic person, during the time of his insanity of mind, cannot make will of lands or goods; but such a one as hath his *lucida intervalla*, clear or calm intermissions, may, during the time of such quietness and freedom of mind, make his will, and it will be good.

Swinb. part 11, § 3; ‖8 Ves. 65; 9 Ves. 478; 12 Ves. 445. As to lucid intervals, in which a testator may be deemed competent to make his will, see 3 Bro. C. C. 441; 11 Ves. 11; 1 Phill. R. 90; Rob. on Wills, 32, (3d edit.)‖ ℘ See Kinne v. Kinne, 9 Conn. 102; Turner v. Turner, 1 Litt. R. 102; Johnson v. Moore's Heirs, 1 Litt. R. 371; Case of Cochran's will, 1 Monr. 263; Hathorn v. King, 8 Mass. 371; Cook v. Fisher, 1 Paige, 171; Dew v. Clarke, 5 Russ. 163; Bogardus v. Clarke, 1 Edw. 166; Stewart's Executors v. Lispenard, 26 Wend. 255; Whitenach v. Stryker, 1 Green's Ch. 9; Watson v. Watson's Heirs, 2 B. Monr. 74; Reed's will, 2 B. Monr. 79; Stone v. Damon, 12 Mass. 488.℘

(B) Who are capable of making a Will and Testament.

ℊ One who is still under guardianship as *non compos* may make will, if actually of sound mind.

Stone v. Damond, 12 Mass. 488; Breed v. Pratt, 18 Pick. 115.ℊ

So also, an idiot, *i. e.* such a one as cannot number twenty, or tell what age he is, or the like, cannot make a will or dispose of his lands or goods; and although he make a wise, reasonable, and sensible will, yet it is void: but such a one as is of a mean understanding only, that has *grossum caput*, and is of the middle sort, between a wise man and a fool, is not prohibited to make a will.

Swinb. part 11, § 4.

An old man likewise, who, by reason of his great age, is childish again, or so forgetful that he forgets his own name, cannot make a will, for a will made by such a one is void.

Swinb. part 11, § 1; 6 Rep. 23, Marquis of Winchester's case.

ℊ If at the making of the will the testator understands what he is doing, he has sufficient capacity; it is not essentially necessary that he should be able to manage his affairs generally.

Kinne v. Kinne, 9 Conn. 102.

Mental capacity to make a will is always presumed; incapacity must be proved.

Lessee of Hoge v. Fisher, Pet. C. C. Rep. 163. See Stevens v. Vancleve, 4 Wash. C. C. Rep. 262.ℊ

‖When the mind of a dying person is reduced by the stress of his malady, or by general exhaustion, to such a state of mental depression and debility as to be incapable of a determinate testamentary act, a paper signed by him as his will, under such circumstances, will be rejected by the ecclesiastical court; especially if such instrument contain internal evidence of intellectual weakness, and disturbs the settlement of the testator's affairs by a former well-considered will made by him when in full possession of his mental powers.

Brouncker v. Brouncker, 2 Phill. R. 57.

Mental incapacity may invalidate only a part of a will, as, in a late case, where a testator wrote the first part of what was propounded as his will with his own hand, but the concluding part was written by the executor, who was principally benefited, and who was the active agent in bringing the witnesses to the house of the deceased.

Bellinghurst v. Vickers, 1 Phill. 187; and see Wood v. Wood, Ibid. 357.‖

So also it seems a drunken man, who is so excessively drunk that he is deprived of the use of his reason and understanding, during that time may not make a will; for it is requisite when the testator makes his will, that he be of sound and perfect memory, *i. e.* that he have a competent memory and understanding to dispose of his estate with reason.

Swinb. part 11, § 1, and § 6.

A man who is both deaf and dumb, and is so by nature, cannot make a will; but a man who is so by accident, may by writing or signs make a will; and so may a man who is deaf or dumb by nature or accident.

Swinb. part 11, § 1 and 10; and see Inst. Jur. Civ. lib. 2, tit. 12; and Vin. Comm. Ibid.; Huber, præl. Ibid.

And so also may a man that is blind.

Swinb. part 1, § 1 and 11. ℊ See Stevens v. Vancleve, 4 Wash. C. C. Rep. 262.ℊ

But an alien enemy,(*a*) persons convicted and *attainted*, and recusants convict, cannot make a testament of lands or goods.

Wood, inst. 335. ‖(*a*) That is, if he have no license from the king. See 1 Black. Com. 372; Hargr. Co. Lit. 2 b, n. 8.‖

Neither may the head, or any of the members of a corporation, make a will of the lands or goods they have in common, for they shall go in succession.

Fitz. Abr. *Test.*; 1 Perk. § 498.

A traitor attainted, from the time of the treason committed, can make no will of his lands or goods, for they are forfeited to the king: but after the time he has a pardon from the king for his offence, he may make a will of his lands and goods as any other man.

Swinb. part 11, § 12; 5 & 6 Ed. 6, c. 11, § 9. So, if he dies before attainder, his will is good. Likewise his will of goods, which he hath as executor to another, is good, for they are not forfeited. Id. ibid.

A man who is attainted or convicted of felony cannot make a testament of his lands or goods, for they are forfeited: but, if a man be only indicted, and die before the attainder, his will is good for his lands and goods both; and if he be indicted, and will not answer upon his arraignment, but stand mute, &c., in this case his lands are not forfeited, and therefore he may make a will of them.

Swinb. part 11, § 13. *N. B.* The forfeiture of a felon's lands relates to the time of the fact committed, but the forfeiture of goods to the time of the judgment given.

And if a man kill himself, his will, as to his goods and chattels, is void, but as to his lands is good, ‖because there is no attainder.‖

Plow. 61, Hales v. Petit. ‖In the early jurisprudence of Rome suicide did not invalidate the testament, and it was resorted to occasionally by persons apprehensive of capital punishment in order to avoid the forfeiture, which consequence Tacitus calls the *pretium festinandi*. However, this was altered by the emperors, and the will of a suicide was only good in case the self-destruction proceeded from impatience of pain or loss of reason. See Cod. Lib. vi. tit. 22, § 2.‖

A man likewise who is outlawed in a personal action cannot make a will of his goods and chattels, so long as the outlawry continues in force, but of his lands he may make a will.(*a*)

Swinb. part. 11, § 21. ‖(*a*) The outlawry absolutely forfeits his chattels to the king, but the rents of the lands are only forfeited after inquisition and during the outlawry.‖

But note: That however the wills of traitors, aliens, felons, and outlawed persons are void as to the king or lord that has right to the lands or goods by forfeiture or otherwise: yet the will is good against the testator himself, and all others but such persons only.

Wood, v. 1, 791; Shep. Abr. part 4, *voc. Test.*

And note also: By the civil law, the wills of divers others, as excommunicate persons, heretics, usurers, incestuous persons, sodomites, libellers, and the like, are void; but by our law, the wills of such persons, at least as to their lands, are good by the statutes that enable men to devise their lands.

Wood, v. 1, 791; Shep. Abr. part 4, *voc. Test.*

In short, all persons whosoever, male or female, old or young, lay or spiritual, at any time before their death, whilst they are able to speak so distinctly, or write so plainly, that another may understand them, and perceive that they understand themselves, may make wills of their lands,

goods, and chattels, and that although they have sworn to the contrary; and none are restrained of this liberty, but such as are before named.

Wood, v. 1, 791; Shep. Abr. part 4, *voc. Test.*

ß When a paper purporting to be a will is wholly written by the testator himself, it is *primâ facie* evidence that he was in his senses, and the *onus probandi* to overthrow the presumption lies on those who impugn it.

Temple v. Temple, 1 H. & M. 476.ȣ

(C) What are the Requisites to constitute a good Will.

To constitute a good will it is necessary,

First, That the testator be a person legally capable of making a will. See, "*Who are capable of making a Will*," (B) *antè*.

Secondly, That there be a person to take, and one that is capable; for in all gifts by devise, or otherwise, that are good, there must be a donee *in esse*, and not *in posse* only, and one that shall have capacity to take the thing given, when it is to vest, or the gift shall be void.

Shep. Abr. part 4, pl. 13, *voc. Test.*

And hence it is, that where the devisee of lands or goods, or an executor of a will, doth die before the devisor, or him that makes the will, the devise and will is void, and that neither the heir nor executors shall have the thing devised.

Shep. Abr. part 4, pl. 13, *voc. Test.*; Plow. 345, Breet v. Rigden.

A devise to the wife for life, and after to the children unpreferred, is good.

1 And. 60, Amner v. Luddington.

But a devise by a man to his heir and his heirs is void.

2 And. 11, Garmyn v. Arstete.

One devised his leases of lands to B, his eldest son, except the sum of 140*l.* to be paid out for portions for his daughters, and made B his executor; and held a good devise to them after this manner, and that the daughters might sue for it in the ecclesiastical court, or court of equity.

Shep. Abr. part 4, pl. 13, *voc. Test.*

If one devise to the son in tail, and if he die without issue, to the next of his name; the daughter after married cannot have it, for she is not of his name.

Cro. Eliz. 532, Bon v. Smith. But if she had not been married, she would have had it, as being next of the name. Id. ibid.

One seised of a manor and lands deviseth the same to his son, and after, by another part of his will, deviseth part of the same to another of his sons; these devises are good, and they shall be joint-tenants.

3 Leon. 11.

Thirdly, That the testator, at the time of making his will, have *animum testandi*, i. e. a mind or serious intention to make such a will.

ßSweet v. Boardman, 1 Mass. 258.ȣ

For it is the mind, not the words of the testator, that gives life to the will: since if a man rashly, unadvisedly, incidently, jestingly, or boastingly, and not seriously, writes or says that such a one shall be his executor, or have all his goods, or that he will give to such a one such a thing; this is no will, nor to be regarded. And the mind of the testator herein is to be discovered by circumstances; for if at the time he be sick, or set himself seriously to make his will, or require witnesses to bear witness of it, it shall

be deemed in earnest; but, if it be by way of discourse only, or of somewhat he will do hereafter, or the like, it shall be taken for nothing.

Swinb. part 1, § 3; β Harrison v. Rowan, 3 Wash. C. C. R. 580; Hoge v. Fisher 1 Pet. C. C. R. 163; Baker v. Lewis, 4 Rawle, 356; Sterret v. Douglass, 2 Yeates, 48; Dornick v. Reichenback, 10 S. & R. 84; Stevens v. Vancleve, 4 Wash. C. C. R. 262.γ

β A testamentary paper began as follows: "My wish, desire, and intention now is, that if I should not return, (which I will, no preventing providence,) what I own shall be divided as follows," &c. It then proceeded of the testator's property, with reference to the state of his family, as it then existed, supposing his wife to be pregnant. He went on the proposed journey, returned home, and died, about a month afterwards. Held, that the disposal was subject to the condition of his dying away from home, and therefore that the paper ought not to be admitted to probate.

Todd's will, 2 Watts & S. 145.

A mistake in drafting a will does not render it void.

Comstock v. Hadelyme Ecclesiastical Society, 8 Conn. 254.γ

Fourthly, That the mind of the testator in making his will be free, and not moved by fear, fraud, or flattery.

For when a testator is moved to make his testament by fear, or circumvented by fraud, or overcome by some immoderate flattery, the same is void, or at least voidable by exception; and therefore, if a man, by occasion of some present fear or violence, or threatening of future evils, does at the same time, or afterwards by the same motive, make a will, it is void, not only as to him that puts him so in fear, but as to all others, although the testator, confirms it with an oath; but if the cause of fear be some vain matter, or, being weighty, be removed, and the testator afterwards, when the fear is past, confirm the testament, in this case, perhaps, the will may be good. And if a man, by occasion of some fraud(*a*) or deceit, be moved to make a will, if the deceit be such as may move a prudent man or woman, and if the end be evil also, the will is void, or voidable at the least; but, if the deceit be light and small, or if it be to a good end, as where a man is about to give all his estate to some lewd person, from his wife and children, and they persuade the testator, that the lewd fellow is dead, or the like, and thereby procure him to give his estate to them, this is a good will. And one may, by honest intercessions, and modest persuasions, procure another to make himself or a stranger executor to him, or the like, and this will not hurt the will. Also, a man may use fair and flattering speeches to move the testator to make his will, and to give his estate unto himself, or some friend of his; except it be in case where the flatterer first threatens him, or puts him in fear,(*b*) or to his flattery joins fraud and deceit; or where the testator is a person of weak judgment, or under the government of the flatterer, or in danger from him; as when the physician shall persuade his patient under his hand to make his will, and give his estate to himself;(*c*) or the wife attending on her husband in his sickness shall neglect him, and in the mean time flatter him to give her all: or where the persuader is importunate, and will have no denial: or when there is another testament made before; for, in all these cases, the will will be in danger to be avoided. If I be much privy to another man's mind, and he tells me often in his health how he intends to settle his estate, and he being sick, I, of my own head, draw a will according to his mind, before declared to me, and bring it to him, and ask him, whether this shall be his will or no, and he considers of it, and then delivers it back to me, and says, Yes; this

is a good will. But if otherwise, some friends of a sick man, of their own heads, shall make a will, and bring it to a man in extremity of sickness, and read it to him, and ask him, whether this shall be his will, and he says Yes, yes; or if a man be in great extremity, and his friends press him much, and so wrest words from him,—especially if it be in advantage of them, or some friends of theirs: in these cases the wills are very suspicious.

Swinb. part 11, § 25, and part 7, § 2, 3, and 4; ℘ Brown v. Molliston, 3 Whart. 129.℘ (*a*) *N. B.* Fraud in wills of lands is only examinable in the courts of common law, not of chancery. Swinb. 478. And fraud in a will of personal estate is only examinable in the ecclesiastical court. 2 P. Wms. 286, Steventon v. Gardiner et al. ‖As to the effect of fraud in setting aside a will, see *post*, (G), and see Mountain v. Bennett, 1 Cox R. 353.‖ (*b*) For in that case it is to be presumed, that the testator is rather moved by fear, than by the subsequent flattery. (*c*) For the law will presume that the testator did it lest the physician should neglect or forsake him.

℘ A may by fair argument and persuasion induce another to make a will even in his own favour.

Miller v. Miller, 3 S. & R. 269. But see Elliott's will, 2 J. J. Marsh. 342.℘

Fifthly, That the will be made in the form prescribed by law.

℘ A will of personal property must be executed according to the laws of the place where the testator had his domicil at the time of his death: if not so executed, it will not pass personal property in a foreign country, although executed according to the laws of that country.

Desesbats v. Berquier, 1 Binn. 336.℘

The forms which the law prescribes differ according to the species of property which is to be disposed of, that is, whether it be real or personal. And this leads us to consider the several kinds of wills and testaments, and the circumstances requisite to each.

(D) Of Wills in Writing.

THERE are two sorts of wills or testaments: First, in writing, which is, where the mind of the testator, in his lifetime, by himself, or some other by his appointment, is put in writing; or, secondly, by word, or without writing, which is, where a man is sick, and for fear that death, or want of memory or speech, should surprise him, that he should be prevented, if he stayed the writing of his testament, desires his neighbours and friends to bear witness of his last will, and then declares the same presently, by word, before them; and this is called a *nuncupative* or *nuncupatory* will or testament; and this being after his death proved by witnesses, and put in writing by the ordinary, is of as great force for any other thing, but land,(*a*) as when at the first in the life of the testator it is put in writing. See of *Nuncupative Wills*, *post*, (E).

1 Inst. 111; Perk. § 476; Wood, part 1, 787. (*a*) In some cities and boroughs lands may pass as chattels by will nuncupative or parol, without writing. 1 Inst. 111. [But not without writing, and signed and attested in like manner as wills of other lands, since the stat. 29 Car. c. 3.]

A codicil is also in writing or by word, as a will or testament is.

1 Inst. 111.

The civilians have other divisions of wills and testaments, solemn and unsolemn, privileged and unprivileged, whereof the common law makes no mention.

By the common law, no lands or tenements, (except by particular custom,) were devisable by any last will or testament, neither could they be

transferred from one to another, but by solemn livery of seisin, matter of record, or sufficient writing.(*a*) Because it was presumed, that the testator would do that *in extremis* that he would not do in his health; that it proceeded from the distemper of his mind, by the anguish of his disease, or by sinister persuasion, to which in his sickness he was more subject.

1 Inst. 111 b; 1 Roll. Abr. 608. (*a*) The true reason seems to be from the nature of the feudal tenure and the relation that was first established betwixt the lord and his tenant. For though donations after length of time were made to the tenant and his heirs, or the heirs males or females of his body, under certain duties and services expressly reserved, or which the law created; and though the word *heirs*, &c., be words of limitation, and appropriated to measure out the length or continuance of the estate; yet they were always understood the heirs of the present tenant, who being liable to the same services when they came into the tenancy, the lord was to have the tuition and education of such heirs, in case they happened, by reason of their minority, to be incapable of performing the services, that so he might, by his care and discipline, secure to himself tenants always capable thereof, either in their own persons, if they happened to be males, or by proper marriage with his tenants, if they proved to be females; and, therefore, by no act of the tenant's could he dispose of the feud, so as to defeat the lord of the advantages of his seigniory. And hence it was, that a tenant could not devise it even to his own heir, so as to make him a purchaser thereof; for then he coming in not by the donation of the lord, but the disposition of the tenant, though he remained liable to the naked services, yet the lord lost the advantage of wardship, marriages, &c., which were annexed only to those who came in upon the terms of his own donation by descent. 1 Eq. Cas. Abr. 401.

But this being altered by statute, we are next to inquire—

I. *What shall be a good Will in Writing to pass Lands and Tenements.*

The stat. 32 H. 8, c. 1,(*b*) usually called the Statute of Wills, enacts, That every person having manors, lands, &c.,(*c*) shall have power to give, dispose, will, and devise by will,(*d*) in writing or otherwise,(*e*) by act executed in his lifetime, all his said manors, &c.; any law, statute, &c., to the contrary notwithstanding.

(*b*) There have been several resolutions concerning wills made pursuant to this statute since the making thereof; but as the statute 29 Car., which is now the proper pattern to follow, has altered the forms by requiring more ceremony and greater exactness, it will be sufficient barely to mention some of the cases on this statute of 32 H. 8. (*c*) That the lands must be *sua*, and therefore lands purchased after the will is made will not pass. Vide Plow. 344. [*Sed* vide 2 Ves. jun. 427.] ‖A codicil confirming will of lands in general words will pass lands purchased between making the will and codicil. See 7 Term R. 487.‖ (*d*) A devise of an authority to executors to sell, is within the act. Moor, 341. (*e*) A man beyond sea wrote a letter, in which he declared his will to be that his land should go in such a manner; and adjudged a good will. Moor, 177. So, if a man had ordered one to make his will, and thereby to devise Whiteacre to A and his heirs, and Blackacre to C and his heirs, and he had written the devise to A, but before the devise to C was written, the devisor died; yet as to A this had been a good devise. 3 Co. 31 b. So, a will was held good where a lawyer took only short notes, with design to reduce it into form, which he afterwards did, but the devisor died before it was read to him. 1 And. 34. A will wrote without the appointment of the testator, if read to him, and approved by him, was held good, signing and sealing not being necessary. Cro. Eliz. 100; Dyer, 72 a; 2 Leon. 35.

"And further, by the statute of frauds and perjuries, 29 Car. 2, c. 3, § 5, all devises and bequests of any lands or tenements devisable by the statute of wills, or by any particular custom, shall be in writing, and signed by the party devising the same, or some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect.

"And by § 6, no devise in writing of lands, tenements, or hereditaments

or any clause thereof, shall be revocable, other than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent: but all such devises and bequests shall remain in force until the same be burnt, &c., in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in presence of three or four witnesses, declaring the same."

Therefore, if a will be of lands or tenements, it must be in writing, and it must be committed to writing at the time of the making thereof; and it is not sufficient that it be put in writing after the death of the testator, being first made by word of mouth only, for then it is but a nuncupative still. But, if the will be first made by words of mouth, and be afterwards written, and then brought to the testator, and he approve of it for his will: or if the testator, when he declares his mind, appoint that the same shall be written, and thereupon the same is written accordingly in the lifetime of the testator, these are good wills of land, and as good as if they had been written at the first. Therefore, if one be very sick, and another come to him and ask him whether his wife shall have his lands, and he say, Yes; and a clerk being present, put this in writing, without any precedent, commandment, or subsequent allowance of the sick man, this is no good will of the land. So, if one declares his whole mind before witnesses, and sends for a notary to write it, and dies before he comes, and the notary writes it after his death, this is no good will of the lands, but a good nuncupative will for the goods and chattels, except the testator declares his mind to be, that it shall not be his will unless it be put in writing; for then, perhaps, it may not be a good will, even for his goods and chattels. So, if he that writes the will cannot hear the party speak, and another, that doth stand by the sick man, tells him what he says; in this case, if there be none others present to prove that he reported the very words of the sick man, this will be no good will of the land. But if a notary takes directions from the sick man for his will, and after goes away and writes it, and then brings it again and reads it to the testator, and he approves it; or, if it be written from his mouth by the notary according to his mind, and his mind were to have it written, although it be not showed or read to him afterwards, these are good testaments. So, if the notary only take certain rude notes or directions from the sick man, which he agrees to, and they be afterwards written fair in his lifetime, and not showed to him again, or not written fair until after his death; these are good wills of lands. But if a sick man bid the notary make a will of his lands, but do not tell him how, and the notary make a devise of it after his own mind, this is no good will: and yet if it be after read unto him, and approved by the testator, it may be good. If a will be found written in the testator's house, and not known by whom, and it be read unto and approved by the testator, this is not a good will in writing for lands and goods.

Wood, part 1, 798; Dy. 72; Plow. 345.

Having shown how far writing is necessary, it remains to consider,

1. In what Language and Hand a Will may be written.

It is not material in what matter or stuff, whether in paper or parchment, nor in what language, whether in Latin, French, Dutch,(*a*) or any other tongue, or in what hand or letters, whether in secretary hand, Roman hand,

or court hand,(*b*) or in any other hand, a will be written, so that it be fair and legible, that it be read and understood: neither is it material whether the same be written at large, or by notes or characters usual or unusual, as XX*s.* for twenty shillings, or when the figure 1 is used instead of the letter A, if it be usual in the testator's writing, or the like, for the will is good notwithstanding. So also, if some words be omitted, or improper sentence used, when the intent and meaning is apparent; as, where a man says, "I make my wife of this my last will and testament," leaving out the word *executrix*, yet the will is good: and this shall be understood. But if it be so done as it cannot be read,(*c*) or by reading the mind of the testator cannot be known, then the will is void and of no force; in like manner as a nuncupative will is, when the words spoken are so ambiguous, obscure, and uncertain, that thereby the meaning of the testator cannot be known or understood.

Swinb. part 4, § 28. (*a*) But N. B. It must be so framed as to pass estates according to the rules of our law. 1 Vern. 85, Bovey v. Smith. ‖(*b*) Though written in pencil, that circumstance only will not prevent a testamentary paper being received. 1 Phil. R. 1; 2 Phil. 173.‖ (*c*) Where a will was written so blindly that it was scarce legible, and the legacies were in figures, it was referred to a master to examine what those legacies were, and he to be assisted by such as were skilled in the art of writing. 1 P. Wms. 425, Masters v. Masters.

We now proceed to treat,—

2. Of the Circumstances of Signing, Attestation, Publication, &c.

The clauses of the 29 Car. 2, above recited, having rendered those circumstances necessary, it is next to be inquired, When, in legal construction, these requisites shall be deemed to have been complied with? which may be best collected by attention to the following cases.

It has been held, that sealing a will is a signing within the statute of frauds and perjuries.

2 Str. 764, Warneford v. Warneford; [Gryle v. Gryle, 2 Atk. 176; *sed* vide Smith v. Evans, 1 Wils. 313, and Right v. Price, Dougl. 244;] ‖Ellis v. Smith, 1 Ves. jun. 11; Wright v. Wakeford, 17 Ves. 459, *contrà*.‖

‖"I, John Thomas, do make this my will," is equivalent to a signature. Morison v. Turnour, 18 Ves. 183.

Whether a will, executed by a person not able to write, by making his mark, is good, does not appear to be expressly decided; but as it has been held, that the mark of a witness in such case is a sufficient signing, the same would no doubt be held as to a mark by the testator.

Harrison v. Harrison, 8 Ves. 185; Addy v. Grix, Ibid. 504; Wright v. Wakefield, 17 Ves. 459; Rob. on Wills, 94.‖

℔ Where a testator's hand was guided by another person with his consent, and he afterwards acknowledged it; held, that in point of law this was the act of the testator.

Stevens v. Vancleve, 4 Wash. C. C. R. 262.℔

But a will in writing need not be sealed; but it is added,—*quære*, if it be good to pass freehold or inheritance?

Perk. 477; {1 Dall. 94, Hight v. Wilson.} ‖Sealing is not indispensable, nor is it sufficient without signing. 17 Ves. 459.‖

Where the testator owns his hand before the witnesses who subscribe the will in the testator's presence, the will is good, though all the witnesses did not see the testator sign; and it is observable that the statute of frauds

does not say, the testator shall sign his will in the presence of three witnesses; but requires these three things: first, That the will should be in writing. Secondly, That it should be signed by the testator. And, thirdly, That it should be subscribed by three witnesses in the presence of the testator.

3 P. Wms. 254, Stonehouse et ux. v. Evelyn; [Grayson v. Atkinson, 2 Ves. 454. S. P.]; {1 Ves. J. 11, Ellis v. Smith;} ‖Addy v. Grix, 8 Ves. J. 504, *acc.*; Westbeech v. Kennedy, 1 Ves. & Bea. 363.‖

β An attestation in the same room with the testator is a sufficient subscription in his presence.

A. Howard's will, 5 Monr. 202.β

Nevertheless, a will has been held to have been well executed, though it was not mentioned in the attestation to have been signed in the presence of the testator.

2 Stra. 1109, Croft v. Pawlet; ‖Brice v. Smith, Willes R. 1.‖ {It is not necessary, in Pennsylvania, that there should be subscribing witnesses to a will. 1 Dall. 94, Hight v. Wilson.}

{Where one only of the witnesses subscribes his name, and the other two attest the will by setting their marks, the attestation is good within the statute.

8 Ves. J. 185, Harrison v. Harrison; Ibid. 504, Addy v. Grix.

It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses.

5 Bos. & Pul. 415, Longchamp v. Fish.}

If a will is attested by three witnesses, who severally signed their names, not being present together; yet each signing being in the presence of the testator, makes it a good will within the statute.

2 Ch. Cas. 109, Anon. [So, Jones v. Luke, Feb. 1, 1742, B. R., 2 Atk. 176, by Sanders' notes; 2 Ves. 455, S. C.] ‖See the Roman law on this point stated, Rob. on Wills, p. 124.‖

But if a man subscribes and publishes his will in the presence of two witnesses, and they subscribe it in his presence, and after makes a codicil in writing, reciting that he had made a former will and confirmed the same, (except what was excepted by the codicil,) and declares, that the codicil shall be taken as part of his will, and publishes it in the presence of one of the witnesses to the first will and another new witness; this is not a good will, for there were not three subscribing witnesses in the presence of the testator; and one of the witnesses to the codicil never saw the will. Adjudged, though it was objected, the will and codicil made but one will, and the circumstance of three witnesses wanting to complete the will was perfected by the codicil.

3 Mod. 262, Lea & Lib.

So, if a man makes a will in several pieces of paper, and there are three witnesses to the last paper, and none of them ever saw the first; this is not a good will.

3 Mod. 263, Lea & Lib.

‖An unattested testamentary paper cannot pass an interest in real estate, unless it be clearly referred to in a will duly attested, so that there can be no doubt as to the paper referred to. It cannot be incorporated in the will merely because it is found in the same cover therewith, endorsed as being the party's will.

Smart v. Prujean, 6 Ves. 560; and see Wilkinson v. Adam, 1 Ves. & Bea. 445. De Bathe v. Fingal, 16 Ves. 167.‖

(D) Of Wills in Writing. (*Signing, Attestation, &c.*)

When there is a clause of attestation to a paper, but it is not attested, it is not conclusive evidence of the abandonment, by the testator, of his intention that it should operate as a will.

Jones v. Kea, 4 Dev. 301.

[It was proved that C made his will, consisting of two sheets of paper, all of his own handwriting, and signed his name at the bottom of each page; and that he also made a codicil of his own handwriting upon one single sheet, and called in H, showed him both the sheets of his will, and his signature to every page thereof, and told him that was *his will;* and then showed H the codicil, and desired him to attest both the will and the codicil: which he did, in the presence of the testator, and in the manner appearing upon the face of the instrument, and then went out of the room. V and L came in immediately afterwards, and the devisor showed them the codicil, and the *last sheet of the will*, and sealed both before them. C then took each of them up severally as his act and deed for the purposes therein mentioned. Then the witnesses attested the same in the testator's presence, but NEVER SAW *the* FIRST *sheet of the will; nor was* THAT *sheet* PRODUCED *to them; nor was the same, or any other paper*, UPON THE TABLE. *Both* the sheets of the will were found *with the codicil* in the testator's bureau, after his death, all wrapped up in one piece of paper; but the two sheets of the will were not pinned together. And the question upon these facts was, Whether this will was duly executed according to the statute of frauds? After three several arguments before the Court of King's Bench, and one argument before all the judges in the Exchequer Chamber, Lord Mansfield delivered the judgment. His lordship said, that the question made at the trial, and submitted by the case, as it then stood, turned upon the solemnity *of the* EXECUTION; and they were of opinion, "that the due execution of this will could "not be come at, in the method wherein the matter was then put;" that if this were considered as a special verdict, they thought it was defectively found as to the point of the *legal execution* of the will; that every *presumption* ought to be made by a jury, *in favour* of such a will, when there was no doubt of the testator's intention; and that they all thought the circumstances sufficient to *presume* that the first sheet was in the room: and that the jury ought to have been so directed: but, upon a special verdict, nothing could be presumed; therefore they were all of opinion, "that it ought to be tried over again;" and if the jury should be of opinion, "that it was then in the room," they ought to find for the will generally, and they ought to *presume*, from the circumstances proved, "that the will *was* in the room."

Bond et al. v. Seawell et al., 3 Burr. 1773; S. C., Black. R. 407, 422, 454.]

A will of lands was originally executed in the presence of two witnesses only, and at the distance of four years afterwards, the testator re-executed his will, by drawing a pen on the old strokes, in the presence of one other person, who likewise subscribed his name as a witness to it. Upon an ejectment, brought by the heir at law, and on a special verdict, it was determined by the court, that this will was properly executed, and attested under the statute of frauds and perjuries.

MS. Rep. Jones v. Dale, B. R. Hil. 16 G. 2; [2 Atk. 176, by Sanders, notes, S. C.; 2 Ves. 455, S. C.]

It was determined by the Lord Chancellor, that a will is well proved, though the witnesses did not see the testator sign his name; if he declared

it to be his handwriting to them, and they attested it in his presence, and in the presence of each other.

MS. Rep. Grayson v. ———, *in Canc.* 25 & 26 G. 2; [Grayson v. Atkinson, 2 Ves. 454, S. C.;] ‖Addy v. Grix, 8 Ves. 504; Westbeech v. Kennedy, 1 Ves. & B. 362.‖

A will was attested by three witnesses, in the presence of the testator and of each other, but the testator did not write his name or put his seal in their presence, but pointed to the paper and said, that was his will, and he had wrote it, and that his name, William Ellis, subscribed, was his writing and name; and laid his hand on the seal, and said, that was his seal. On a question in this cause, Whether this will, so executed, was good as a revocation of a former will, under the sixth section of the statute of frauds? Lord Hardwicke, assisted by Lord C. J. Willes, Strange, Master of the Rolls, and the Chief Baron, held clearly that it was; it not being doubted but that it was good as an original will, according to the authorities determined on this head, that the owning it to be his handwriting was sufficient.

MS. Rep. Ellis v. Smith, Hil. & Mich. 27 G. 2; [Dougl. 244, notes, S. C.;] ‖1 Ves. jun. 11;‖ Dormer v. Thurland, 2 P. Wms. 509.

‖So where a will of lands was subscribed by three witnesses in the presence and at the request of testator, it was held sufficiently attested within the statute, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was.

White v. Trustees of the British Museum, 6 Bing. 310.‖

The testator desired the witnesses to go into another room, seven yards distant, to attest his will, in which there was a window broken, through which he might see them. And it was held, that this will was well attested according to the statute of frauds: for though the statute requires attesting in the testator's presence, to prevent another will from being obtruded in the place of a true one, yet it is enough if the testator might see. It is not necessary that he should actually see them signing; for, at that rate, if a man should but turn his back, or look off, it would vitiate the will: and the signing was in the view of the testator; he might have seen it, and that is enough. So, if the testator, being sick, should be in bed and the curtain drawn.

2 Salk. 688, Shires v. Glascock. [In Casson v. Dade, 1 Bro. Ch. Rep. 99. Lord Thurlow, relying on the authority of this case, inclined to think a will well attested, where the testatrix could see the witnesses through the windows of her carriage, and of the attorney's office.]

But where one devised lands to J S and his heirs, and duly subscribed his will in the presence of three witnesses; who, for the ease of the testator, went down stairs into another room, and attested the will there, which was out of the presence of the testator: and the heir at law was prevailed on to join in a lease and release of the devised premises, in trust for the devisee; the will and the release were both set aside; for the release reciting that the will was duly executed, was *suggestio falsi*, and the concealing from the heir, that it was not duly executed, was *suppressio veri;* either of which circumstances are good reasons for setting aside a release or conveyance.

1 P. Wms. 239, Broderick v. Broderick.

‖And if the testator is in such a position that he cannot in any manner

see the witnesses, the will is not duly attested. But if it is attested in such a place that the testator *may* see it done, this is sufficient.

Doe d. Wright v. Manifold, 1 Maule & S. 294; Todd v. Earl of Winchilsea, Moo. & Malk. Cas. 12; Morrison v. Arnold, 19 Ves. 671.‖

If the testator writes the will with his own hand, though he does not subscribe his name, but seals and publishes it, and three witnesses subscribe their names in his presence, it is a good will:(*a*) for his name being written in the will it is a sufficient signing: and the statute does not direct, whether it shall be at the top, bottom, &c.; and, by three judges against one, sealing is a signing within the act. And note; it is not said in the act, that the signing shall be in the presence of the three witnesses at the same time.

3 Lev. 1, Lemayne v. Stanley. ‖(*a*) According to the report of this case in Freeman, the court was of opinion, that if the testator had his name on a stamp, it would be enough if he impressed his name instead of signing it. And in Strange v. Barnard, 2 Bro. C. C. 585, it was held that stamping was equivalent to sealing. By the civil law, if a testator could not write, he was admitted to make his mark, but an eighth subscribing witness (seven being the ordinary legal number,) was called in to subscribe in place of the testator. Cod. 6, 23, 1.‖

℘In New York, a testamentary paper found in an iron chest, among the valuable papers of a deceased person, without signature, having an attestation clause, without witnesses, written by the deceased, with his name in the beginning, evincing much foresight and deliberation in its provisions, and disposing of both real and personal estate to a large amount, according to the common law, as generally understood and received in England and in that State, on the 19th of April, 1775, when the common law was adopted as a part of the law of New York, is a good will of the personal estate bequeathed by such will.

Watts v. The Public Administrator, 4 Wend. 168.℘

J S, before the statute of 29 Car. 2, viz. in 1668-9, wrote his will with his own hand on a sheet of paper, and the writing went to the bottom on one side, and half-way on the backside, which will, at the end of it, had the name and seal of J S, and notice was taken in his own hand of some interlineations. At a very little distance on the backside of the same paper, a codicil was written, which extended almost to the bottom of the same backside of the paper, and was dated 1679, which was after the *statute of frauds*, and had the name of the devisor subscribed, and his seal affixed; in which codicil a legacy as to a house was revoked, and the same was thereby devised to A for life, and after to his brothers successively, but notice was not taken of the names of his brothers in the codicil, but they were named in the will. At the top of the will was written, "Signed, sealed, and published, as my last will and testament, in the presence of the same, being written here for want of room below." This was likewise written in the testator's own hand, and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator for four years, and about twenty-seven or twenty-eight years ago, he and the other two witnesses were called up in the night, and sent for into the testator's chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence; but they did not see any writing, nor did the testator tell them it was his will, or say what it was; but he believes

this to be the paper, because his name is there, and the names of the other witnesses, and he never witnessed any other deed or paper for the testator; and though the testator did not set his name or seal to the will in their presence, yet he had often seen him write, and believes the whole will and codicil to be of his handwriting. And Lord Chief Justice Trevor inclined that here was sufficient evidence to find the codicil well executed, and the jury found it accordingly.

Comyns's Rep. 197, Peate v. Ougley; ‖Vin. Abr. tit. *Devise*, (N), 7, pl. 12.‖ It was insisted, that upon this evidence it is apparent that the codicil was written before the execution of the will; for otherwise there was no reason that the witnesses should write their names at the top of the first side of the will, and the words written by the testator's own hand as the reason of it, had been false, if the codicil had not then been upon that paper: for there would have been sufficient room below the will for the witnesses to attest it. The witness also says, that the execution was about twenty-seven or twenty-eight years ago; which time is subsequent to the codicil. But it was said, the execution is sufficient within the statute; for there is no necessity that the witnesses see the testator write his name; and if he writes these words, "Signed, sealed, and published as his will," and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will; and a case was mentioned, determined by Lord Chancellor Shaftesbury, before 29 Car. 2, where a man wrote his will with his own hand, and also these words, "Signed and published in the presence of," and no witnesses had subscribed it; this was held to be a sufficient publication. Ibid.

A B made a will or testament schedule, all of his own handwriting, as follows: "In the name of God, *Amen*. I, A B do make this my last will and testament for fear of mortality till I can settle it more at large. I do give and bequeath 1000*l*. unto D P to be paid by my executor (or) administrator: and for sure payment thereof, I do charge all the real and personal estate which I have in the world, I being very desirous to make a provision for the said D P for several good reasons inducing me thereunto. In witness whereof I have hereunto set my hand, this present 7th day of December, 1704. Signed A B." He delivered the same to the said D P, and about a fortnight before his death, A B declared he had left with D P an unquestionable security for 1000*l*., charged upon his real and personal estate, and that he had done the same for fear of mortality, till such time as he could make a full and complete will; which he declared he would do as soon as his wife was brought to bed, but that he waited to see if it were male or female. He died suddenly 6th February, 1794, leaving his wife then lying in of a daughter. The Judge of the Prerogative Court gave sentence against the will, and pronounced that A B died intestate. On appeal to the delegates (among whom were Holt, C. J., Price, B., and Judge Dormer) the sentence was reversed, and they pronounced for the will.

2 Ld. Raym. 1282, Powel v. Beresford.

A, by will in writing, attested by three witnesses, devised a copyhold estate to his wife; and afterwards the testator, on the day of his death, directed his nephew to obliterate some devises, but said nothing as to the copyhold devised to his wife, and then caused a memorandum to be written, that he examined, perused, and approved of the will as so obliterated and altered by his nephew in his presence, but did not republish it in the presence of three witnesses, but directed his nephew to have it written out fair; but before it was brought back he became delirious; and this was held a good will as to the copyhold.

2 Vern. 498, Burkitt v. Burkitt. ℘ To make a valid will, the testator must have in-

tended the paper to operate as it stood, without a further act to complete it, and that must appear from the paper itself. Murry v. Murry, 6 Watts, 356. See Barnett's appeal, 3 Rawle, 15.ℊ

Testator gave instructions to make his will of his real and personal estate, and when it was brought to him he made several alterations, and then wrote the whole over as altered, with his own hand: this being found in his study, though not signed or sealed, was held a good will. *Note;* the first sentence was, that he died intestate, but that was reversed by the delegates.

Comyns's Rep. 453, Limbery et al. and Hide. ‖See Sikes v. Snaith, 2 Phil. 351; Wood v. Wood, 1 Phil. 365.‖ ℊ Memoranda written from the dictation of the deceased, and proved by two witnesses to have been read to, and approved of, by him; held, in Pennsylvania, to constitute a sufficient will. Rohrer v. Stehman, 1 Watts, 442.ℊ

A will of lands *made before* the statute of frauds, had but two witnesses, and the testator *died after* the statute, without altering his will, and his Honour thought it a good will to pass the lands; but the other side insisting to have it tried at law, he directed it accordingly.

Prec. in Chan. 77, Serjeant v. Puntis.

A witness proving a will of lands, swears that he subscribed the will, as a witness in the same room with, and at the request of, the testatrix; two others swore, that they saw the will executed by the testatrix, and that they subscribed the same in the testatrix's presence; a fourth witness was gone beyond sea, and therefore could not be examined. Cowper, C., doubted as to the proof of the execution of this will, but would declare no opinion on the point until farther application, saying, that the heir at law, then an infant, might by that time come of age. Afterwards Lord Macclesfield held, that the bare subscribing by the witnesses in the same room did not necessarily imply it to be in the testator's presence, for it might be in a corner of the room in a clandestine, fraudulent way; and then it would not be a subscribing by the witness in the testator's presence, merely because in the same room; but that here it being sworn by the witness, that he subscribed the will at the testatrix's request, and in the same room, this could not be fraudulent, and was therefore well enough.

1 P. Wms. 740, Longford v. Eyre. The proper way of examining a witness to prove a will as to lands, is that the witness should not only prove the executing of the will by the testator, and his own subscribing it in the presence of the testator, but likewise that the rest of the witnesses subscribed their names in the testator's presence; and then one witness proves the full execution of the will, since he proves that the testator executed it; and likewise that the three witnesses subscribed it in his presence. *Per* Lord Chan. Macclesfield, Ibid. 741; {1 Esp. Rep. 391, Doe v. Smith.} ‖As to the proof of wills, see *post*, (D) III.‖

‖Where the testator was blind, it was held not necessary to read over the will to him before execution in the presence of the attesting witness.

Longchamp v. Fish, 2 New R. 415.‖

[The law, as stated by Lord Macclesfield in the last case, seems conformable to the decision of the Court of King's Bench in the case of Right and Price, in which the court held, that corporal presence merely was not sufficient, unless there was likewise mental knowledge of the fact. In this case, on the last day on which the testator made an effort to sign the will, but failed, the witnesses being present, the form of an attestation was written on the second sheet, and they put their names to it in the room where the testator lay, but he was in a state of insensibility. And the question was, Whether this will was duly executed for passing lands

according to the statute of frauds? In support of the will it was argued, that insensibility was something short of death, and if the testator was alive, it could not be said that the will was not attested in his presence. That the question was, Whether the testator having done all that was necessary on his part, and the attestation having been made according to the words of the statute, a fair transaction should be set aside because a formality required, according to an implied intention of the legislature, had not been complied with: that it did not appear but that the testator might, by possibility, have opened his eyes while the witnesses were subscribing their names; and *that*, according to the law as laid down in Shires and Glascock, would have been sufficient. *Sed per curiam*,—The court will lean in support of a fair will, and not defeat it for a slip in form, where the meaning of the statute has been complied with: this was the principle of Shires and Glascock's case, and other cases of that sort. But the case *then* before the court was not one where there was a measuring cast and room for presumption. All the witnesses knew, at the time of the attestation, that the testator was insensible. He was a log, and totally absent to all mental qualities. That it was usual in precedents of wills to say, that the witnesses subscribed *at the request of the testator:* that indeed was not expressly required by the statute, but the practice showed the general understanding, and the nature of the thing implied a request. The attestation in the testator's presence was as essential as his signature, and all must be done while he was in a capacity to dispose of his property. In this case the testator could not know whether the will that he had begun to sign was that which the witnesses attested; he was dead to all purposes or power of conveying his property.

Right v. Price, Dougl. 241.]

‖Whether an acknowledgment of the witness to the testator of his handwriting to the attestation is sufficient, seems not to have been expressly decided, though it would seem clearly not according to the words of the statute.

See Rob. on Wills, 124.‖

β The inhabitants of an incorporated town, to whom property is devised for the support of a school, are competent witnesses to support the will.

Cornwell v. Isham, 1 Day, 35.

An executor who has acted under the will and accepted the trust, who derives no beneficiary interest under it, is a competent witness to establish the will.

Comstock v. Hadelyme Ecclesiastical Society, 8 Conn. 254.β

It has been determined, that a trust of an inheritance must be devised in the same manner as a legal estate. Thus where—

J S, seised of lands in fee, conveyed them by lease and release to trustees, to the use of them and their heirs, in trust, that (after such moneys raised as therein mentioned) the trustees should convey to A, his heirs and assigns, or to such person or persons as he or they should direct; the moneys were raised, and A by will attested only by two witnesses devised the premises to B. Lord Chan. Macclesfield said, there could be no question but that a trust of an inheritance could not be devised otherwise than by a will attested by three witnesses, in the same manner as a legal estate; for if the law were otherwise, it would introduce the same inconveniences

as to frauds and perjuries, as were occasioned before the statute, by a devise of the legal estate in fee-simple. Decreed the will void, and that the trustees should convey the premises to the testator's heir at law.

2 P. Wms. 258, Wagstaff v. Wagstaff. And his lordship held, that as the will did not refer to the deed of trust, but A had undertaken to devise the land as owner thereof, without any relation had to the pretended power; this made it much stronger against the will. Ibid. 260.—It was said *arg.* that this will, though not good by way of devise, should be so by way of appointment, like a copyhold surrendered to the use of a will, which may be devised by a will attested by two witnesses, or one witness only. But his lordship said, that the copyhold passes by a surrender, and not by the will, and that if this matter had not been settled, it might be more reasonable to say, when I have surrendered my copyhold to the use of the will, a will of this copyhold shall be so executed, and in such manner, as by the act of parliament a will of lands ought to be executed; but this case having been ruled otherwise, he said he would not shake it. Ibid. 258. In Hil. Vac. 1727, his honour admitted it to be settled that where a copyhold in fee is surrendered to the use of a will, such will, though executed in the presence of one or two witnesses only, is good, because it passes by the surrender, and not by the will, which is only a declaration of the use of a surrender: but that if a copyholder be seised only of the trust or equity of redemption of the copyhold, and devise such trust or equity of redemption, there must be three witnesses to the will; for here can be no precedent surrender to the use of the will to pass this trust; and the trust and equity of redemption of all lands of inheritance are within the statute of frauds, otherwise great inconvenience would arise therefrom; and it is no prejudice to the lord to comprise the trust of a copyhold within that statute, because the person who has the legal estate of the copyhold is tenant to the lord, and liable to answer all the services. Ibid. 261, Anon.—But in the case of Tuffnel and Page, East. 1740, Lord Hardwicke was of opinion, that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered to the use of a will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest: and decreed accordingly. Ibid. at the bottom of the p. 261. {17 East, 299, Doe v. Danvers.} ‖See *post*, p. 500; and see 55 G. 3, c. 192, by which a disposition by will of copyholds is rendered as valid, without a surrender by testator, as it was before with one.‖

Upon an issue directed out of Chancery, wherein the question was, Whether a man was *compos* or not at the time of executing the will? it was held by the Chief Justice, that it was not necessary that all the witnesses to the will should see it executed; if one of them saw it executed, and the others were present, he said it would be sufficient.

Barnard. Rep. in B. R. 367, Durrant v. Durrant.

J S, possessed of a term of five hundred years in Blackacre, afterwards purchases the fee-simple in B's name, and devises Blackacre by will, all of his own handwriting, to C in fee; but the will was neither dated, subscribed, nor attested. Decreed *per* his honour, that as this was a term which would have attended the inheritance, and in equity have gone to the heir, and not to the executor, in which respect it was to be considered as part of the inheritance, so the will which was not attested by three witnesses, as the law required it to be when land was to pass, should not carry this term.

2 P. Wms. 236, Whitchurch v. Whitchurch. A will not attested, &c., as in the present case, will be sufficient to pass a term in gross; but not a trust of a term attendant on an inheritance, nor consequently the term itself. *Per* his honour, Ibid. 238.—A will not attested as the statute of frauds requires, shall not pass any estate of which the heir, as heir, would otherwise have had the benefit. *Per* his honour. Ibid.—Gilb. Rep. in Eq. 168, S. C.; 2 Mod. Cases in Law and Equity, 124, S. C. ‖Rob. on Wills, 1, 158, 162.‖

Upon an ejectment by the heir at law, the question for the opinion of the court was, Whether it should be left to a jury to determine, whether the witnesses to a will (being all dead) set their names in the presence of the

testator, and this merely upon circumstances without any positive proof? *Per cur.*,—This is a matter fit to be left to a jury, which is all that is referred to the court. The witnesses, by the statute of frauds, ought to set their names as witnesses in the presence of the testator; but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not it must be proved; if inserted, it does not conclude but it may be proved *contrà*, and the verdict may find *contrà*; then, if not conclusive when inserted, the omission does not conclude it was not so, and therefore it must be proved by the best proof the nature of the thing will admit. In case the witnesses be dead, there cannot probably be any express proof, since at the execution of wills few are present but the devisor and witnesses; then, as in other cases, the proof must be circumstantial, and here are circumstances. First, three witnesses have set their names, and it must be intended they did it regularly. Secondly, one witness was an attorney of good character, and may be presumed to understand what ought to be done rather than the contrary. And there may be circumstances to induce a jury to believe, that the witnesses set their hands in the presence of the testator, rather than the contrary; and it being a matter of fact, it was proper to be left to them; as, whether the livery was given on a feoffment, when no livery is endorsed; whether a deed was executed when only a counterpart was produced, &c. And the court was of opinion, that the plaintiff ought to be nonsuited.

Comyns's R. 531, Hands v. James.

A will shall not be read on proof of a witness's hand, unless there be positive proof that he is dead.

Comyns's R. 614, Bishop v. Burton. {Proof of the witness's hand is sufficient if he is not in the kingdom; 5 Ves. J. 404, Lord Carrington v. Payne; or if proper inquiry has been made for him, and nothing can be heard of him; 9 Ves. J. 5, M'Kenire v. Frazer: or if he has become insane. 9 Ves. J. 381, Bernett v. Taylor.}

Upon a trial at bar concerning the execution of a will, it did not appear upon the face of it, that the attestation of the witnesses was made in the presence of the testator, which being objected to, a case was cited, where Lord Chief Justice Eyre held it a matter proper to be left to a jury, whether they believed it to be so done or not: and Mr. Justice Chappel cited a case to the same purpose, *quod curia concessit*, and held it not necessary it should be inserted in the will, that the attestation was in the presence of the testator, though by the statute it is necessary it should in fact be so attested.

Vin. Abr. tit. *Devise*, (N), 9, pl. 4, Croft on dem. of Dalby v. Pawlet; ‖2 Stra. 1109, S. C.; and see Brice v. Smith, Willes R. 1, Lord Rancliffe, v. Parkins, 6 Dow. 202.‖

If a copyholder, after admittance, surrenders the lands to the use of his last will, and by his last will gives them to A, but the will is not attested by any witnesses; yet A is well entitled to the lands. *Per* Lord Chancellor.

Barnard. Rep. in Chan. 11, 12, Tuffnel v. Page. And his lordship said, that the reason is, that the party is in by the surrender, and not by the will, and therefore it is good, though there be no witnesses at all; but that it is necessary that the will be in writing, and if it be so, it is sufficient, if it be signed by the party; and so it is where a person is entitled to the trust of a copyhold, though there were no surrender at all to the use of the will, nor the will attested by any witness, yet it is sufficient to give the trust of a copyhold estate. *Per* his lordship, Id. ibid. ‖See Noel v. Hoy, 5 Madd. 38.‖ [The necessity that a will of copyholds should be in writing, is questioned by Mr. Watkins in his Treatise on Copyholds.]

A surrender was made of a copyhold estate to trustees, to the use of the

will; which was made with only two witnesses to it. It was admitted, that a will of a copyhold estate does not require three witnesses; but this is a devise of a trust relating to lands, so within the very words of the statute of frauds: the heir controverting the surrender and the will, this point was not determined, but two issues ordered.

Select Cases in Chan. 42, Appleyard v. Wood. Lord Chancellor seemed to be of opinion, that the devise of a trust must ensue the nature of the estate, and not make it necessary to have three witnesses, as the copyhold might be devised without three witnesses; but this may be a question to be determined when the issues are tried. Ibid.—Vin. Abr. tit. *Devise* (N), 1 pl. 4, S. C., states it thus:—A seised in fee of copyhold lands, makes a surrender to the use of B and C, and their heirs, to the use of his will, and devises the land to D. Parker, Chan., was of opinion, that the circumstances required by the statute 29 Car. 2, in devises of lands, ought to be observed in this case: for, by this surrender the fee of the copyhold was in the surrenderors, and only a trust devised by the will, which cannot pass by the devise, without the circumstances required by the statute of frauds, in relation to devises of lands, be duly observed. But the counsel insisting that a devise of copyhold is not within the statute, Lord Chancellor said, that if the surrender had been only to the use of the will, that might have been a question in this case, but now it is not; however, he inclined to think it necessary in that case, but would not determine that point, that not being the case before him.

‖A devise of a customary freehold requires an execution and attestation, according to the statute of frauds, since it is distinguishable from a copyhold; but it has been held otherwise where there is a custom in the manor to surrender such customary estate to the use of a will.

Hussey v. Grills, Ambl. 299; Cook v. Danvers, 7 East, 299.

By the custom of a manor, the legal interest in customary lands was not devisable, but was transferable by a deed of bargain and sale, having the effect of a surrender, in which the operating words were "bargain, sell, and surrender;" on presentment of which, admittance was granted to the alienee; but an equitable interest in such lands might pass by devise. A tenant of the manor conveyed his customary lands by bargain and sale to a trustee, upon trust for such person as the tenant, by any deed or instrument in writing, or by his last will, or any codicil thereto, or any instrument in the nature of a last will or codicil, to be by him *legally executed*, should appoint or devise the same; and under this conveyance the trustee was admitted; it was held, that the equitable interest in the lands could not pass by the *unattested codicil* of the tenant.

Willan v. Lancaster, 3 Russell, 108.‖

A will made beyond sea, of lands in England, must be attested by three witnesses.

2 P. Wms. 293. {But a will of *personal property* must be executed according to the law of the testator's domicil at the time of his death. 1 Binn. 336, Desesbats v. Berquier. See *Executors and Administrators*, (A,) and 3 Ves. J. 418.}

‖Lands in the East Indies, held by a tenure of the nature of fee-simple, do not pass by an unattested will, but descend to the person who would be heir at law in England.

Gardiner v. Fell, 1 Jac. & W. 22. See Sheddon v. Goodrich, 8 Ves. 481.‖

J S had a power at any time during the joint lives of him and M his wife, by his last will, or any writing purporting to be his last will, under his hand and seal, attested by three or more credible witnesses, (if he should die before his wife, without any issue between them then living,) to charge lands with any sum or sums of money not exceeding 2000*l.*, to be paid to such persons and in such proportions

as he should appoint: with the like remainder to M if she should die without issue in the life of her husband, J S. There was no issue of the marriage; and J S, by his last will in writing under his hand, attested by three witnesses, but not sealed, reciting his power, &c., disposed of 2000*l.* to the plaintiffs (being his relations) in the proportions therein mentioned. There were three witnesses to the will. Two of the witnesses swore that the will was signed by the testator, in the presence of all the three witnesses; but the third swore, that the testator, having written and signed the will before, called for the witnesses, and declared that writing to be his last will, and that all the three witnesses were then present, and subscribed their names in his presence. Lord Chanceller King referred it to the judges of B. R., who determined (on argument) that the will was void as a charge for want of being sealed.

2 P. Wms. 506, Dormer, &c. v. Thurland, &c. Lord Chas. King said, that though he himself inclined to think the will of the lands good, if the testator should acknowledge the name to be his, and the witnesses should subscribe in his presence, yet that point should be reserved to the defendant; and said, that he took this will to be a good one, and, being so, to be a good charge. But in the case of Stonehouse and Evelyn, in proving a will disposing of a real estate, the proof was full that the three subscribing witnesses did subscribe their names in the presence of the testatrix; but one of them said, he did not see the testatrix sign, but that she owned, at the same time the witnesses subscribed, that the name signed to the will was her own handwriting, which Sir Joseph Jekyll held, without all doubt, to be sufficient. 3 P. Wms. 254. And ibid. the reporter says, that on his mentioning his honour's opinion above to Mr. Justice Fortescue Aland, he said, it was the common practice, and that he had twice or thrice ruled it so upon evidence on the circuit; and that it is sufficient if one of the three subscribing witnesses swears the testator acknowledged the signing to be his own handwriting; and it is remarkable, that the statute of frauds does not say that the testator shall sign his will in the presence of three witnesses, but requires these three things: first, that the will should be in writing; secondly, that it should be signed by the testator; and, thirdly, that it should be subscribed by three witnesses in the presence of the testator.

A will of land was duly signed by testatrix in the presence of A, and also published; which A wrote the will, but is now dead: his hand was proved. After this the testatrix called in B to be a witness to the will; she told him it was her will, and published it as such; after this she called in C and did the same. The question was, Whether these witnesses attesting this will at several times, though all in the presence of the testatrix, were according to the statute of frauds and perjuries? Baron Price held it ill, (*a*) at Lent assizes at Devon, 1717.

Vin. Abr. tit. *Devise*, (N), 10, Ca. 3, p. 128. (*a*) For the intent was, that all the witnesses should be together, that one might testify for the other; and this was a ready way to let in fraud and perjury, for after the first witness had attested it, there might be a rasure or interlineation. *Per* Baron Price. Ibid.

Lord Keeper Wright held a publication of a will before three witnesses, though at three several times, good within the statute, and thought the writing of the will with the testator's own hand a sufficient signing within the statute, though not subscribed or sealed by him; but doubted whether owning the subscription to be his was sufficient: but the validity of the will is a question at law, and therefore ordered it to be tried.

Pr. Ch. 185, Cook v. Parsons; ‖Jones v. Lake, 2 Atk. 176; see the doctrine of the civil law as to the witnesses attesting at separate times stated. 1 Roberts, 124, *notâ*.‖

If a man draws up his own will, and sends it to counsel to be advised of the legality of it, this is no will, unless it has a publication after he receives it back from his counsel. If after his will comes from counsel, with alter-

ations made by counsel, the party puts his seal to it, or subscribes his name, or writes upon it, "this is my will;" though there be no witnesses to it, yet this is a good publication, because any of those declare his intent, that it should be his will: and though it have no formal beginning, but begin, "also I give and bequeath;" and though there be blanks for the names of such persons as he says he has made a lease or feoffment to, to perform his will, if there be such a lease or feoffment, this is a good will, and shall direct those persons, to whom such lease, &c., is made, to perform all things according to the directions of such will.

Vin. Abr. tit. *Devise*, (N), 2, pl. 16. ‖This case was before the statute of frauds, 29 Car. 2.‖

℘ A will is duly published, when it is written and signed by the testator with his own hand; or when he has signed one not written by himself, and it is attested by the witnesses as the statute requires.

Ray v. Walton, 2 Marsh. 74.℘

If a testator signs his will, but delivers it as his act and deed, yet this will be a sufficient publication.

Vin. Abr. tit. *Devise*, (N), 7, Ca. 13, p. 125. ‖This case was before the statute of frauds, 29 Car. 2.‖

[Where the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will (for it was delivered as his act and deed, and the words "*sealed and delivered*" were put above the place where the witnesses were to subscribe their names:) it was adjudged by the court, as it is said, for the inconveniences that might arise in families from having it known that a person had made his will, that this was a sufficient execution.

Trimmer v. Jackson, 4 Burn's Eccl. Law, 117. ‖See *per* Lord Hardwicke in Ross v. Ewer, 3 Atk. 161, and Rob. on Wills, vol. ii. 101.‖

So, if the devisor show the will unto the witnesses, saying, "This is my last will and testament," or, "herein is contained my last will," this is sufficient without making the witnesses privy to the contents thereof, provided the witnesses be able to prove the identity of the writing; that is to say, that the writing showed is the very same writing, which the testator in his lifetime affirmed before them to be his will, or to contain his last will and testament.

Swinb. 52; Godb. O. L. 66.

And a publication may be inferred from circumstances, and will have the same force to render the instrument valid, as if expressed by parol declaration.

In a case which came on at the assizes at Lincoln before Mr. Justice Dennison and a special jury, the facts were these: W made his will in his own handwriting, thereby devising his real estate, and the form of attestation was in these words, "*signed, sealed, published, and declared for the last will and testament of the said W, in the presence of us*," I M, J W, and W P. The heir at law brought an ejectment; and, to prove the will, the devisee produced W P, one of the three subscribing witnesses, who deposed, that about July, 1760, J W, then butler to W, the devisor, came and told him that he must come to his master; that, upon entering the room, he found his master sitting with a table before him, on which were some papers open; and that his master called him and the said J W, and I M,

(then his housekeeper,) up to the table to him, where they all came; then W further addressed himself to them all, desired them *to take notice*, and then took a pen, and, in all their presence, signed and sealed each part of his will, and laid both the said parts open and unfolded before them to subscribe their names as witnesses thereto, which they all did, by the direction of the said W, in his presence, and in the presence of each other, he showing them severally where to write their names. But that the said W, otherwise than as above, did not declare or publish either part to be his will, or say what it was. The counsel for the plaintiff contended, that this was not a sufficient proof, by one witness, of a complete execution of the will: and they produced, on the other hand, the other two subscribing witnesses, who, in many particulars, did not give a clear and distinct evidence; and could not recollect whether they had signed one or two papers; or whether then, or at any time before the said W's death, they understood what they had so witnessed to be W's will, though J W seemed to admit he conjectured it so to be. But both J W and I M swore that they did not see the said W either sign or seal any part of his will: that P, the other subscribing witness, was not at that time in the room, when (at the said W's desire) they wrote their names to the two papers as they then appeared; that W did not declare or publish it as his will, nor did they know it to be a will. The counsel for the devisee then called R P, the testator's groom, who swore, that one morning, in the beginning of July, 1760, J W told him, that his master had much wanted him, and that, upon his the said R P's offering to go to his master to receive his orders, J W told R P, that the business was done, and that J P had supplied his place, and that he the said W P, J W, and I M, had that morning been witnessing their master's will. And S being called, swore, that in the beginning of July, 1760, I M came one morning after breakfast into the kitchen, and told her that she, and J W, and W P, had that morning witnessed their master's will, though he had not told them it was so. Upon the state of the evidence on both sides, it was insisted for the plaintiff, that as the law stood before the statute of frauds, publication of a will was an essential part thereof; and, if so, there was nothing in that statute to take it away: and it was further insisted, that, by the said statute, one requisite to a good and valid devise of lands was, that it should be attested and subscribed in the presence of the devisor by three or four credible witnesses, and that the words *attested and subscribed* must import, that it should be published as a devise or will by the testator, in the presence of the witnesses. On the contrary, for the defendant, it was contended, that neither before nor since the statute, publication was necessary, and further, supposing any such publication was necessary, that the testator had used words and done acts which amounted to a publication within the meaning of the statute, which had not directed or prescribed any particular form or manner in which such publication should be made; that the testator's using these significant words to all the witnesses when he called them up to the will, "*take notice*," and then signing both parts of his will, and then delivering both the parts thereof to the witnesses to attest, directing them where to sign their names, and to witness each part under the common and usual form of attestation, which the witness did, was a sufficient execution and publication of his will; the words "*signed*, *sealed*, *published*, and *declared*," being all written in the testator's own handwriting, and the witness P, swearing that both parts of the will lay open to the inspection of

all the witnesses when they subscribed their names, and it appearing, by the evidence of P and D, that both the other witnesses had declared that they had been attesting W's will. And they said that this was a much stronger case than that of Peate and Ongly, *suprà*. And Mr. Justice Denison was of opinion, that, if the witnesses for the defendant were credited by the jury, this was a due execution within the statute, and a sufficient publication; and the jury found accordingly for the defendant. But the plaintiff's counsel insisted that the point, whether a good publication or not, should be reserved for a case to be argued above. However, the matter was compromised on the defendant's remitting the costs.

Wallis v. Wallis, 4 Burn's Eccl. Law, 127.

An illiterate man drew up himself, and wrote on two sides of a sheet of paper, several devises and bequests, which he subscribed; but they were neither signed nor witnessed. He afterwards added a *memorandum*, (so called by the testator himself,) beginning at the end of the second, or the beginning of the third side of the same sheet of paper, by which he disposed of a part of his personal estate, but said, that he did not mean thereby to disannul any part of his former devise or dispositions. This memorandum was subscribed by him in the presence of three witnesses, and he declared it to be his last will in their presence, and he delivered it to them, and desired them to subscribe and attest it, which they did in his presence, and in the presence of one another. The Court of King's Bench held this to be a sufficient publication of the original will to pass the real estate.

Carleton v. Griffin, 1 Burr. 549.]

An uncle having devised his estate from his nephew and heir at law, a younger brother of the heir at law, at the uncle's funeral, snatched the will out of the hands of the executor, and tore it in many small pieces, but most of them, and particularly that part wherein was the devise of the land, were picked up and stitched together again: and on a bill to have the will established, it was decreed, that the devisee should (*a*) hold against the heir, and he to convey to him, although there was no direct proof made that the heir directed the tearing of the will.

2 Vern. 441, Haynes v. Haynes. (*a*) A will, though gnawn to pieces by rats in the life of the devisor, if by joining the pieces together the contents can be known, will be good. So, if a will continues in writing at the death of the devisor, though gnawn, burnt, or lost after, it shall stand good. Allen, 2, 55. {See 2 Binn. 406, Havard v. Davis; 1 Bay. 464, Legare v. Ashe.} A writing, in form of an indenture, and sealed and delivered, if proved to be intended a will, shall be good as such. 1 Ch. Cas. 248. ——1 Mod. 117.

3. Of the Republication of a Will.—What will amount to a Republication; and where a Republication will make a Devise good.

If a man devises certain lands, and after aliens them to a stranger, and repurchases, and after shows his intent, that the said will shall be his will; this is a new publication, and the lands shall pass by the devise.

1 Vern. 330, Hall v. Dunch. *β* A will may, in Pennsylvania, be republished by parol. Jones v. Hartley, 2 Whart. 103. See Linginfelter v. Linginfelter, Hardin, 119, Jackson v. Potter, 9 Johns. 312. *β*

β Any circumstance whatever, plainly indicative of the testator's satisfaction with a paper as his will, at a particular period, may be taken as a republication from that time.

Hatch v. Hatch, 2 Hayw. 32.

So, the testator's saying his will was in a box in his study amounted to a new publication.

2 Vern. 209, Cotton and Cotton; 1 Freem. 264, states it thus:—A devised his lands in D, and all his other lands unto his wife, and after purchased other lands, and then discoursing with B, B desired him to let him have those new purchased lands at the rate that he bought them. A answered no; for that he had made his will, and settled his estate, and intended that his wife should have his whole estate. The court strongly inclined that this was a new publication, and applied particularly to the lands; and that it was no matter for alleging, *quod dixit animo testandi*, for that must necessarily be intended, when the discourse had particular reference to the will.——2 Chan. R. 138, 140, S. C. says, a trial at law having been had upon this point, a special verdict was found by C. J. North's directions; and on a solemn argument, all the judges of C. B. held it a republication of the will, and that the lands belonged to the wife, and that the Court of Chancery affirmed the judges' opinion.

If a man seised of lands, devises all the lands to J S, and afterwards purchases the manor of D, and after writes in his will that J D shall be his executor: yet this is not any new publication, to make the lands pass.

1 Roll. Abr. 618. ℘A will once revoked by a written declaration, cannot be set up by a republication by parol. Witter v. Mott, 2 Conn. 67; see 2 Whart. 103; Hardin, 119.℘

But if, after the purchase of the manor of D, he delivers the first will as his will, and says, that it shall be his will, without putting any words thereto; yet this is a new publication to make the lands newly purchased pass.

1 Roll. Abr. 618; 1 Salk. 237.

So, if a man seised of lands in D devises to another by his will in writing all his lands in D, and after purchases other lands in D, and after one J S comes to him, and requests him to give him the buying of the lands last purchased; and he answers him, that he will not, but that his intent was, that those lands should go to his executors (the devisee being made executor by the will) as his other lands should: and after the devisor causes a codicil to be writ, in which there is a devise of several personal things, as corn and implements of household, and annexes to it his first will; and after dies without other publication; yet this shall be a sufficient publication to make the lands newly purchased to pass by the will, for there need no other words in the will than there were before; and his intent appears that it should be his will, by annexing the codicil.

1 Roll. Abr. 618.

But if a man has issue of two daughters, A and B, and he devises lands to A and to the heirs of her body, and for want of issue to B, and A dies in the lifetime of the testator, leaving issue, though after the testator annexes a codicil to his will, and thereby disposes of some part of his personal estate; yet this will not amount to a republication of the will, nor give any title to the issue of A, though the testator had declared in his will, that B had married against his consent, and that what he had given her was in full of her portion, and in bar of any further part of his real estate.

1 Abr Eq. Cas. 407; 2 Vern. 722, Hutton v. Simpson. [Ld. Camden, speaking of this case in the Attorney-General v. Downing, Ambl. 374, says, "In Hutton v. Simpson, it is said that annexing a codicil to a will, if it relates only to personal estate, will not operate as a republication; but I am of opinion, that either the report is mistaken, or that it is not law. The principal question was not, Whether the codicil was a republication of the will? but, Whether the sense of the words, *heirs of the body*, could be altered by the death of the testator's daughter in his lifetime? and the testator afterwards making a codicil, held, they could not; as in Stead v. Berrier, 2 Jon. 135." His lordship, therefore, was of opinion, that a will of lands would be republished by a

codicil that related wholly to personalty, provided it was attested by three witnesses grounding himself upon this, as Lord Thurlow observed, that where the testator annexes a codicil to his will, he treats them as *one instrument*, and makes them *so from that time*. Lord Thurlow therefore thought, that where a testator speaks of a codicil to be annexed to his will, *he speaks again of his will*, and at least, in cases of personal estate, it amounts to a republication. Coppin v. Fernyhough, 2 Bro. Ch. R. 296;] {4 Bro. C. C. 2, Barnes v. Crowe; 7 Ves. J. 98, Pigot v. Waller, *acc.*, which see, *infrà*, p. 510, 511.}

It has been doubted, if one devises a lease to his daughter, and afterwards renews the lease, and afterwards adds his codicil to his will without taking any notice of the lease, whether the renewal of the lease is a revocation, and whether the adding of a codicil to his will is a republication.

2 Vern. 209.

It has been said, however, that if a codicil be executed after making a will and purchasing lands, it will amount to a republication, and pass the lands purchased after making the will, and that it was so determined by all the judges in the case of Acherley and Vernon: which see, *infrà*. *Sed quære*, unless it appears he had his real estate under consideration.

MSS. R. Gibson v. Rogers, *in Canc.* Trin. 23 G. 2; [Ambl. 93, S. C.] ‖That the case of Acherley v. Vernon is now confirmed, see *post*, p. 507, and 3 Younge & J. 285; 1 Meriv. 285.‖

A having given a legacy *inter alia* to his son Joseph, Joseph died, and he afterwards had another Joseph, and then by a codicil to his will, confirming his will, he took notice, that since the last, it had pleased God to give him another son, and gave him a smaller legacy. Determined, that this was a republication of his will, and amounted to a substituting of the second Joseph in the place of the first; and gave him the first legacy as well as the second.

MS. Rep. Perkins and Micclethwaite; ‖1 P. Wms. 275, S. C.‖

If a man has issue three sons, A, B, and C, and devises lands to B in tail, remainder to C; and B has issue two sons, and dies; and after the devisor says, "My will is, that the sons of B shall have the lands devised to their father, as they should have had if he had lived and had died after;" and then the devisor dies: whether this should amount to a new publication, *dubitatur;* two judges against two.

Cro. Eliz. 422, Fuller v. Fuller. ‖The better opinion seems to be that of Gawdy and Clinch, that it was not a new publication.‖

If J S has issue two sons, William and Robert, and Robert has issue a son named Robert, and J S devises lands to his son Robert, and his heirs; and by the same will gives his grandson 50*l.*, and Robert his son dies; and after J S by parol republishing his will, says, "Robert, my grandson, shall take by my will as Robert my son should have done:" yet the grandson shall not have the lands, for lands cannot pass but by will in writing; and his son Robert cannot import his grandson Robert, especially when, by the same will, he has made a distinction between his son and grandson. The judgment to the contrary, given by three judges against the opinion of Scroggs in the Common Pleas, is said by the reporter to have been reversed in B. R. (as he heard,) though it was argued, that the words of the will were proper enough to pass the lands to the grandson; for that the addition of *grand* only imported a distinction between father and son while living; but that the father being dead at the time of the republication, the grandson might properly be described by the name of son.

1 Lev. 243, Strode v. Berager; 1 Vent. 341; 2 Jones, 135; Raym. 408.

(D) Of Wills in Writing. (*Republication.*)

J S, by a will dated 17th Jan. 1711, devised to M his wife 1000*l.* *per annum* for her life, to issue out of his real estate, his capital messuage at H, &c.; to his sister E 200*l.* *per annum* for her life; and 1000*l.* to L her daughter, for her portion; and after other legacies, he devised the residue of his real and personal estate to A, B, C, D, and F, and their heirs, executors, and administrators, on trust to vest the residue of his personal estate in lands of inheritance; and that his trustees should stand seised and possessed of his real and personal estate to the uses of his will, during his wife's life; and after her decease, if he should die without issue, to the intent that his freehold and leasehold estate, and the lands to be purchased, should be settled to the use of the defendant G for ninety-nine years: then to his first and other sons in tail-male, &c. J S purchased several fee-farm rents, assart rents, and other lands and tenements; and then by a codicil, 2d Feb. 1720, being two days before his death, he recites that he made a will, dated 1st Jan. 1711, and then says, "I hereby ratify and confirm the said will, except in the alterations hereafter mentioned. The portion to my niece L shall be made up 6000*l.*, and what I have given to my sister and niece shall be accepted by them in satisfaction of all they may claim out of my real and personal estate, and on condition they release all right, &c., to my executors and trustees in my will named; and thus having provided for my sister and niece, I devise all the lands by me purchased since my will, to my trustees and executors in my will named, to the same uses, and subject to the same trusts to which I have mentioned to devise the manor of H and the bulk of my estate; and I revoke that part of my will, whereby I appoint A, B, and C, three of my trustees in my will; and I desire K and N to be two of my trustees, and devise my said real estate to them accordingly." Lord Chancellor Macclesfield, 20th Nov. 1723, decreed, that the will was confirmed by the codicil; that J S signing and publishing his codicil in the presence of three witnesses was a republication of his will, and both together made but one will; and by the said will and codicil, his fee-farm rents, assart rents, and lands, contracted to be purchased, and all his real and personal estate, (except the copyhold purchased before his will,) did well pass. On appeal to the Lords, the decree was affirmed.

Comyns's R. 381, Acherley v. Vernon; [3 Bro. P. C. 107, S. C.] J S, by will, dated 25th March, 1700, devised all his lands to A his nephew and his heirs, and directed that he should take the surname of Lytton; and his personal estate be devised to Dame —— Russel, his sister, and the said A, and made them executors. Afterwards J S purchased the equity of redemption of some mortgages in fee, which were mortgaged to him before he made his will, and 13th Jan. 1704, by a codicil attested by three witnesses, he says, "I make this codicil, which I will shall be added to and be part of my last will, which I have formerly made." And Lord Ch. Cowper, assisted by Sir John Trevor, Master of the Rolls, and Lord C. J. Trevor, and Tracey, J., 16th June, 1708, decreed, that this was not a republication. For since the statute 29 Car. 2, there can be no devise of lands by an implied republication; for the paper in which a devise of lands is contained, ought to be re-executed in the presence of three witnesses. Cited *arg.* in the case of Acherley v. Vernon, as the case of Lytton v. Viscountess Falkland; vide Comyns's R. 383.——A, by will, dated 11th October, 1684, only executed, took notice that his lands were settled upon his son B and C in tail-male, and then devised in these words:—"In case my sons shall have no issue male, then, for the preservation of my name and family, I devise my said lands to my brother G and the heirs male of his body issuing." G died in the life of the testator, having issue a son; then Lord Lansdown, by which the devise to G in tail-male lapsed. Aug. 15, 1701, the testator sent for seven persons, and said, "I sent for you to be witnesses to my will, and sometimes to be witnesses to the republication of my will;" and then took a

codicil, dated same day, in one hand, and the will in the other, and said, "This is my will whereby I have settled my estate, and I publish this codicil as part thereof;" and then signed the codicil which lay on the table with the will, in the presence of the witnesses, who subscribed it in his presence. By this codicil he devised in these words: "Whereas I heretofore made my will, dated 11th Oct. 1684, which I do not intend wholly to revoke; but in regard to the many accidents and alterations in my family and estate, I by this codicil, which I appoint to be taken as part of my will, devise as follows;" and then devised several manors, &c., to his son B in fee, and 1000*l. per annum* to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses; but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper; but on the codicil only. And Parker, C. J., and the whole court, held this no republication. For since the stat. 29 Car. 2, there shall be no republication by implication; but the will must be re-executed, otherwise a devise of lands shall not be good. Comyns's R. 384. Vide 10 Mod. 96.——Since the 29 Car. 2, the same forms are necessary to the republishing of a will as to the first making of it. Resolved *per* Lord Ch. Cowper, Trevor, C. J., and Tracey, J. Vide 10 Mod. R. 98. [In the principal case, however, it is clear that Lord Macclesfield did not adhere to the rule he laid down in Lord Lansdown's case, because the will was there (in the principal case) held to be republished without re-execution, and consequently must have been republished, notwithstanding the Statute of Frauds, by implication. *Per* Lord Commissioner Eyre, 4 Bro. Ch. R. 9.] {In Pennsylvania, a will may be republished *by parol.* 2 Binn. 406, Havard v. Davis.} ‖See Piggott v. Waller, 7 Ves. 98, and *post*, 510.‖

[So, one devised his manors to A, B, and C, and all his messuages, lands, tenements, and hereditaments in the county of ——, or elsewhere in any part of England, subject to an annuity, to the use of P for life, remainder, &c., and, afterwards, entered into an agreement for the purchase of lands; and then made two codicils, the latter of which was on a *separate paper*, and though not dated, was agreed to have been made about four or five days before his death; and recited therein that, having in his will appointed several limitations and remainders of his estate, some of which were not agreeable to his present intent, he revoked so much as should be found inconsistent with that codicil, ratifying and confirming the other parts which should not interfere therewith. This paper was attested as "signed, sealed, and published, and *declared* by the testator, as a codicil to his last will and testament." It being contended, that the first codicil would not amount to a republication of the will as to the lands newly purchased, the agreement respecting them not being to be carried into execution until subsequent to the date thereof; the question was, Whether the last codicil, which was subsequent to the time stipulated for carrying the agreement into execution, was a republication of the will as to these lands? And it was contended, that it could not be a republication, because it was not by way of endorsement, or annexed to the will, or shown that the will itself was at that time before the testator. But Sir John Strange, Master of the Rolls, was of opinion, that notwithstanding these objections, the latter codicil amounted to a republication; because it was an express declaration, that the rest of his intent, not inconsistent therewith, should continue and be confirmed: and his honour said, that it might be mischievous to hold that no republication could be but by the testator's taking the will in his hands and republishing it by an endorsement on it, or annexing the codicil to the will itself; the person intending to republish might be at a distance from the will itself, or might not have *it* in his power, by its being in custody of another; and the testator might know the substance, though he could not repeat the particulars.

Potter and Potter, 1 Ves. 437.

And it was admitted by the counsel, in the case of Gibson and Montfort, that if there was, in a codicil, a general clause of confirmation of a will; as, if the testator therein say, "*I confirm my will*," this would make *that* codicil amount to a republication; because it would be the same as if the testator had republished every devise in the will over again. And of that opinion was Lord Hardwicke.

Gibson v. Montford, 1 Ves. 489, 493; and Potter v. Potter, *supra*. {So if the codicil, after reciting the will, contains this expression, "which I fully approve of." 9 Ves. J. 374.}

This point was also so decided in the case of Doe on the demise of Pate against Davy. There D by will, in 1767, after giving several legacies, made the following residuary devise: "And, as to all the rest and residue of my estate, of what nature, kind, and quality soever, I give, devise and bequeath the same unto W P, &c., according to the nature of the respective estates." The testator *then* purchased some customary estates, and afterwards surrendered them to such uses, intents, and purposes as he should by his last will and testament in writing thereof direct, limit, and appoint. He then made a codicil, by which, reciting that he had, by his will, devised all his fee-farm rents in manner therein mentioned, he devised the same to C D, &c., and then proceeded as follows: "I do hereby ratify and confirm all and every the gifts, devises, and bequests, contained in my said will, except what I have hereby altered. And I do desire, that this present writing may be annexed to, accepted, and taken as a codicil to my will, to all intents and purposes." And the question was, Whether the execution of the codicil, subsequent to the purchase and surrender of the copyhold estates, amounted to such a republication of the will as to pass them? In favour of the heir at law, an attempt was made to distinguish this case from that of a devise of freehold, upon the ground that at the date of the will the testator had no copyhold estate, clearly then he had no intention to pass any estate of copyhold to the devisee. Then he afterwards purchased the lands in question, and surrendered them to *such uses as he should declare by his last will*, not to the USES DECLARED or *to be declared by his last will*. He then made a codicil, by which he ratified and confirmed every gift in his will, except what he had particularly altered by it. This, then, it was said, was a ratification only of what he had before expressly given by his will. But the will contained no gift or devise of any *copyhold* lands, nor did the codicil refer to any; on the contrary, it was clear that the only object the testator had in adding the codicil was, to make the particular alteration there mentioned; consequently the copyhold lands were undisposed of, and the heir at law was entitled to them by descent. *Sed per curiam*,—The case of Acherley and Vernon is in point, that the codicil *reciting* that the testator had made his will, and *ratifying and confirming it*, in the alterations aforementioned, was a republication of the will, and both together made but one will, whereby the lands purchased after the will passed.

Doe on dem. Pate v. Davy, Cowp. 158.

And Lord Hardwicke, in the above-mentioned case of Gibson and Mont fort, thought that if the proposition there admitted was law, then any other words that amounted to a confirmation of a will would do as well as words expressly confirming it. And, therefore, that the codicil in the principal case reciting, that "whereas the testator had, by his last will of such a date, given and devised to his executors a sum of money in trust for A,

and another in trust for B, he revoked those legacies, and DESIRED that writing should be a further part of his said last will and testament," amounted to a republication to give the will operation upon lands *subsequently purchased*, under a sweeping clause, "as to all the rest, residue, and remainder of the testator's real and personal estate of what nature and kind soever;" for, his lordship said, though there were not the words, *I confirm my will*, yet there were the words I DESIRE, &c., between which and an actual confirmation there seemed very little distinction. But the case going off upon another ground, no judgment was given thereupon.

Gibson v. Montfort, 1 Ves. 489, 493, *et supra*.

A B by will devised his real estates to certain uses. Afterwards, by deed, he conveyed them to the same uses, until he married, and then to new uses. After the execution of the deed, but before marriage, the testator, by a codicil, attested by three witnesses, and entitled, *A codicil which I direct and desire to be annexed, and taken and considered as part of my last will*, makes a farther disposition of a part of his personalty, and imposes a forfeiture on any person who should disturb his wife; after the codicil he marries. Lord Northington was very clearly of opinion, that the codicil was a republication of the will, being declared to be part of it, and annexed to it.

Jackson v. Hurlock, Ambl. 407. ‖See Meggison v. Moore, 2 Ves. 630.‖

W B, being seised and possessed of real and personal estate, made his will duly attested to pass real estates, and thereby gave and devised all his messuages, &c., and all other his real estate situate at F or elsewhere, to the plaintiffs in trust to sell, and dispose of the money arising from the sale in the manner thereby directed: after making the will, the testator made a codicil thereto, bearing date the 5th November, 1785, *not* duly attested to pass real estates, by which he made some provisions in consequence of the marriage of one of his daughters. After the making and publication of his will and such first codicil, he bought the equity of redemption of an estate then in mortgage for a term of 500 years; and the fee, subject to the term, was afterwards conveyed to him. After this transaction, he made another codicil to his will, dated 27th October, 1788, whereby he made some alterations in the state of his affairs, and disposed of a leasehold estate; but the codicil did not mention the lands purchased since the date of the will, and concluded thus: "In witness whereof I the said testator W B have to this my writing contained in this and part of the preceding sheet of paper, which I declare to be a codicil to my said last will and testament, and which is to be accepted and taken as part thereof, set my hand," &c. The execution of this last codicil was attested by three witnesses. The first was begun, and partly written on the last sheet of the testator's will, and was a continuation from the foot of the said will, and the second codicil was begun, and partly written on the last sheet of the first codicil, and was a continuation from the foot of the said first codicil, and the will and codicils were annexed to each other by or at the request of the testator. It was determined that the last codicil in this case amounted to a republication of the will, and acted upon the after-purchased estate. Lord Commissioner Wilson observed, that the testator saying, "I desire the codicil shall be part of my will," was equivalent to saying, "they shall be one instrument."

Barnes v. Crow, 4 Bro. Ch. R. 2; ‖7 Ves. 486, S. C.‖

‖Robert Piggott, by his will of 4th December, 1824, devised all his real

estates in Salop not settled on his eldest son, and all his manors and real estate in the counties of Warwick, Northampton, Huntingdon, and Cambridge, to trustees and their heirs, upon trust, in case his personal estate should be deficient to raise a sum adequate to pay his debts, and the remainder to be for his eldest son Robert Piggott for life, and after his decease in trust for the first and every other son of Robert Piggott successively in tail-male, remainder to testator's right heirs for ever; and he gave to his two daughters 5000*l.* apiece, and by a codicil duly executed to pass real estate, he recited the will and made alterations in the legacies given by it. On the 22d February, 1736, the testator purchased and had conveyed to him the remaining third of the manor of Chesterton in Huntingdonshire (he having before only two-thirds of it;) and by a codicil of 26th June, 1742, "Made and published by me Robert Piggott, &c., and to be annexed to my will and made part thereof to all intents and purposes," the testator revoked the legacies given by his will and former codicil to his daughter Frances, and directed only 100*l.* to be paid to her in lieu thereof. The question arising, whether the second codicil had the effect of republishing the will so as to pass the estate purchased in 1736, Sir William Grant, M. R., after a review of the cases, determined, on the authority of Barnes v. Crow, that the will was republished by the codicil.

Piggott v. Waller, 7 Ves. 98.

So also, where a testator made three codicils of different dates, endorsed on the back of his will, and the two first referred to lands purchased since the will, and disposed of them according to the directions of the will respecting the testator's general estate, but they were attested by only two witnesses, and the third codicil simply appointed a new executor in room of one named in the second codicil, and was attested by three witnesses: it was held, that the third codicil was a republication of the will and of the second codicil, and that the lands acquired subsequently to the will passed according to the disposition of the will as to the testator's lands in general.

Guest v. Willasey, 2 Bing. 429. The court afterwards, on the case being remitted to them, held, that the third codicil was a republication of the first. 3 Bing. 614.

A codicil, therefore, properly executed, makes the will speak (as it is expressed) at the date of the codicil, unless a contrary intention appear.

Goodtitle v. Meredith, 2 Maule & S. 5; and see Duffield v. Elwes, 3 Barn. & C. 731; Rowley v. Eyton, 2 Meriv. 128. /3 Brownell v. D'Wolf, 3 Mason, 486.3/

But if the will had reference to a power existing at its date, but extinguished previous to the codicil, the codicil cannot have the effect of republishing the will, although another power is substituted for that which was extinguished. Thus, where a man by his marriage settlement, having a power to charge a sum of 2000*l.* on certain premises, made his will accordingly, disposing of this sum, and afterwards, by a subsequent settlement, extinguished his former power, and created to himself a new power of charging the same sum on other property, and afterwards made a codicil with three witnesses, making no mention of the power; Sir W. Grant, M. R., held clearly, that the power itself being gone before the death of the testator, the will had nothing to operate upon, and could not be applied to the new power. It is true, he observed, a codicil has the effect of republishing a will, and makes it speak at the time of the republication. But here the will speaks only of the power given by the mar

riage settlement, which was as much gone as if it had never existed. It was a *new* power for a *new* consideration, affecting *different* estates.

Holmes v. Coghill, 7 Ves. 499; and see Lane v. Wilkins, 10 East, 242.

The effect of a codicil upon a will, in making it speak as to all property possessed at the date of the codicil, may be restrained by the manner in which the codicil is expressed. Thus, where the codicil, reciting the devise by the will, revoked the same as to two of the trustees, and then devised the *said* lands, &c., lands purchased between the will and codicil were adjudged not to pass.

Bowes v. Bowes, 2 Bos. & Pul. 500; Parker v. Biscoe, 8 Taunt. 699; Smith v. Dearmer, 3 Younge & J. 285.

Where a will, containing a general devise of the testator's estate, is republished, an estate *contracted for* after such devise will, in equity, pass in virtue of such republication.

Broome v. Monck, 10 Ves. 605; Hulme v. Heygate, 1 Meriv. 285.‖

J H being seised in fee of certain freehold lands called A, part thereof situate in the county of E and other part thereof in the county of C, and being likewise seised of certain other lands called B, partly freehold and partly copyhold, in the county of E, duly made and published his last will, bearing date 13th of March, 1732, and thereby devised *all* his messuages, lands, tenements, and hereditaments, as well freehold as copyhold, situate, lying, and being in the counties of S, E, and C, or either of them, to his wife for life, and after her decease to various uses: and devised all the rest and residue of his real and personal estate to his wife, her heirs, executors, and administrators, and appointed her his sole executrix. The testator, at the time of making his will, was mortgagee ont of possession of three fifth parts of certain copyhold premises holden of the manor of D, in the county of E, which he afterwards purchased and was admitted to on 20th October, 1735, and in the same year purchased one other fifth part of the same premises, all of which he surrendered thus: "To the uses, intents, and purposes, declared or to be declared in and by his last will and testament."—In the year 1736 he directed a 50*l.* legacy to be struck out of his will, and subscribed the following memorandum in the presence of two witnesses: "September 31st, 1736. The 50*l.* legacy to the poor of the parish of W, scratched out as above, was done in his presence, and by his immediate order, he having paid it himself." The testator died the following year, without revoking or altering his will, or making any codicil thereto, except the codicil or testamentary declaration above mentioned. On a question sent out of Chancery, Whether the copyhold lands to which the testator was admitted the 20th October, 1735, and which he surrendered to the use of his will, were subject to any of the uses mentioned in his will of the 13th March, 1732? The Court of King's Bench certified, that the surrender did, by express reference to the uses declared by the will, adopt and apply the words of the will to these copyhold lands, as if the testator had been seised thereof at the time of making his will; and therefore they were subject to the uses to which all the testator's copyhold lands in the county of E were devised by his will. Lord Mansfield's words, in delivering the opinion of the court, deserve attention: "The stating the nature of a republication will go a great way in the construction of this surrender. When a man republishes his will, the effect is, that the terms and words of the will should be construed to speak with regard to the property

he is seised of at the date of the republication, just the same as if he had had such additional property at the time of making his will. Therefore if one devises lands by the name of B, C, and D, and purchases new lands, and republishes his will, the republication does not concern such new lands, because the will speaks only of the particular lands B, C, and D. But if the testator in his will says, I give *all* my real estate, a republication will affect all such newly-purchased lands, because it is then the same as if the testator had made a new will. Apply this rule to the case of a surrender, and I am of opinion that the surrenderor may express himself so as to make it relate to a will actually made; and that the copyhold lands so surrendered will pass by it. Suppose a testator, seised of copyhold lands, makes his will without a surrender, if he afterwards surrender them to the use of his will, such surrender will clearly make his will good, and is effectual to pass them; because it only obviates the mode and form of conveyance. What has the testator done here? having made his will and declared his lands to uses, he surrenders his newly-purchased copyhold lands to the uses, intents and purposes, declared or to be declared in his will: it is precisely the same thing as if he had said,—'And whereas I have made a will so and so, and devised all my estate to J S to such and such uses, I mean these newly-purchased lands should pass to the same uses.' I cannot possibly make a doubt as to the construction: and there was no occasion to strike out the legacy of 50*l.*, unless he intended that particular part of his will should be cancelled, and the rest stand."

Heylin v. Heylin, Cowp. 130.] ‖See 1 Term R. 455, n. (*f*); 8 Ves. 286; 11 East, 246.‖

It was determined upon the opinion of all the judges, that if a will be made, and afterwards another will without cancelling the former; and then, by an act subsequent to both, the first will be confirmed, the limitations in that will so confirmed will take place; and also, that if there are two inconsistent wills of the same date, neither of which can be proved to be last executed, they are both void by the common law for uncertainty, and will let in the heir at law; and also, that although the wills are dated the same day, the limitations may take place if they are consistent in both, to the disinherison of the heir at law: and upon this opinion, the order appealed from, which was a dismission of the plaintiff's bill in the Court of Exchequer in Ireland, was confirmed in favour of Lord Anglesey, by the House of Lords. See the printed copy.

MS. Rep. Phipps v. Anglesey, in *Dom. Proc.* June, 1751; [5 Bro. P. C. 45, S. C.]

{A testator made a will dated 25th November, 1752, and on the 31st March, 1756, he made another will different from the former. By a codicil in 1776, reciting that he had devised his real estate by his last will dated 25th November, 1752, he charged his real estates with his debts and the legacies given by the codicil, and appointed executors. This was held to be a republication of the will of 1752, and a revocation of that of 1756; establishing the principle that a codicil referring to a former will as the last will cancels intermediate wills.

3 Ves. J. 402, Lord Walpole v. Lord Orrery; 4 Ves. J. 615, 616.—The court rejected evidence offered to prove a mistake of the testator, and that he did not mean to refer to the will to which the codicil did expressly refer.

But if a will be made on 27th May, 1790, to which five codicils are afterwards added, by the fourth of which the testator revokes the bequest

of certain annuities in the will, and by the fifth, after reciting that he had made his will, dated 27th May, 1790, he changes his executor, and adds, "and I do hereby confirm my said will in all other respects," this does not set up the bequests in the will which were revoked by the fourth codicil. There is a great distinction between wills and codicils in this respect. If a man ratifies and confirms his last will, he ratifies and confirms it with every codicil that has been added to it. All the codicils are parts of the will.

4 Ves. J. 610, Crosbie v. Macdoual.}

‖ Where a testator makes two wills, the latter of which is inconsistent with the former, if he afterwards destroy the second will, leaving the first in a perfect state, the original will has been held to be set up again; which doctrine seems to stand upon this principle,—that the first will, being ambulatory during the testator's life, is in existence without any alteration at the time when its operation is to begin; and that which was to be destructive of its operation is out of the way at the moment when it was to have its destructive effect.

Glazier v. Glazier, 4 Burr. 2512.

But if a legacy given by will be adeemed, a codicil, ratifying and confirming the will, has not the effect of setting up the adeemed legacy.

Monck v. Monck, 1 Ball & B. 298; and see Rob. on Wills, 2, 168.‖

β A testator sitting in his bed and holding a paper in his hand, in the presence of the witnesses, said: "This is my will; it was signed and witnessed in 1824, and I have called you to witness it is my last will and testament;" and then requested that a certificate of this republication and acknowledgment should be written on the will, which was done accordingly, and it was signed by the attesting witnesses, though not by the testator himself. Held, that this was a good republication.

Reynold's Lessee v. Shirly, 7 Ohio, 39.β

II. *What shall be deemed a good Will in Writing of Goods and Chattels.*

If it be a will of goods and chattels, and be complete, there must be an executor named in it, and that executor that is named must be capable of the executorship; for this is the principal thing in it. And be there never so many legacies given, and no executor made, this will is but a codicil, and cannot be properly called a testament; for here the party dies intestate, and an administration of the goods must be granted; but where there is an executor, although there be no legacy given, yet it is properly said to be a testament.

Shep. Abr. 14, *voc. Testament.*

{A testator executed his will in due form of law. One of the legatees having afterwards died in the lifetime of the testator, he gave verbal instructions for a new will, which were committed to writing by his friend, in order to take the advice of counsel as to the legality of the limitations therein contained. The testator afterwards drew up a memorandum (nearly agreeing with those instructions) all written with his own hand, but in which his name no where appeared, and gave it to the same friend, together with the original will, for the purpose of drawing a new will from the two. The draft of a new will was accordingly prepared, comprising the subject matter of the original will and the memorandum, and being presented to

the testator, was approved by him; but the signing of it was postponed, until he could also execute a release of a mortgage which he held on part of the estate of his deceased brother. The release was prepared, and approved by the testator, but, being interlined, was returned to the person who wrote it, to be transcribed. Before a fair copy was made and delivered to the testator, he was in a state of delirium, and so continued till he died, without having executed the release or the draft of the new will. That draft was afterwards lost, but was proved to agree in substance, if not in words, with the original will and the memorandum. The original will was established, and the memorandum was also established as a good codicil to it to pass personal estate, although it remained in the hands of the writer of the draft from the time when it was first delivered to him until after the death of the testator.

2 Hen. & Mun. 467, Cogbill v. Cogbill.

C L, in March, 1760, wrote a letter to her attorney containing instructions for drawing her will. After the signature were these words: "This you have under my hand if any thing should happen before the writing is drawn up;" and in a postscript the following passage: "This only by way of memorandum in case I should go off suddenly." She died on the 2d of August in the same year. The prerogative court pronounced against this paper, as being a conditional paper; the operation of it depending on the testatrix dying suddenly; whereas she had time to make a formal will; and parol evidence was admitted. But the delegates reversed the sentence; and pronounced for the paper as the last will and testament of the deceased; thinking it a perfect paper and an absolute disposition.

4 Ves. J. 200, n., Habberfield v. Browning, in 1773.

W M, on 2d October, 1785, drew up in his own handwriting a paper beginning: "A plan of a will proposed to be drawn as the last testament of W M," and endorsed: "A plan designed for the last will and testament of W M." The bequests in the paper were in terms of present gift, and it was dated and subscribed by him. Below the signature, and of the date of 6th October, was a codicil, likewise signed by him as follows: "I must not forget my good friends M and C H, who desire will accept five guineas each for a ring." In December, 1789, he drew up another paper, as: "A plan I propose to draw will from, abrogating all the others I have already drawn out:" this contained a few bequests inconsistent with the former paper, but broke off in the midst of a sentence, and was left unfinished. The former paper was found loose in a desk in his office, where he kept only his official papers, and not any important private papers; and the latter in a bureau in the parlour of his dwelling-house in a bundle of letters and papers. Parol evidence {1} was also given of frequent declarations of W M, showing his intention that the former paper was not, and should not be his will. The judge of the prerogative court pronounced against the validity of the paper of December, 1789, and for the validity of the paper of 2d October, 1785, and of the codicil dated the 6th of the same month; and upon an appeal to the delegates from that part of the sentence which established the will and codicil of October, the sentence was affirmed. But a commission of review was granted, and the commissioners of review reversed the two former sentences, pronounced against the validity of the pretended will and codicil of October, 1785, and declared that W M was dead intestate. Lord Loughborough, in

giving his reasons for recommending the granting of a commission of a review, considered the paper, not as a will, but only a project of a will; not a complete definite rule and law for settling his fortune.

4 Ves. J. 186, Matthews v. Warner; 5 Ves. J. 23, S. C.; 2 Hen. & Mun. 515, S. C. cited. {[1]} It was admitted only *de bene esse*, subject to the opinion of the judges whether the paper was *on the face of it* a will or not; they agreed that *if there was a doubt whether a will or not*, parol evidence should be admitted. 4 Ves. J. 196, 208.

A will disposing both of real and personal property was signed and sealed by the testator, and contained a clause of attestation, which was not subscribed by any witnesses. The paper was considered imperfect by Dr. Calvert on account of the clause of attestation not being witnessed; and he admitted parol evidence; on which he set aside the paper. But the delegates were of opinion, that, it being a will both of real and personal property, it was, *reddendo singula singulis*, a perfect disposition of personal estate, and therefore a good will: and they rejected parol evidence against it.

4 Ves. J. 200, n., Cobbold v. Baas.

If a man leaves twenty several papers behind him executed at different times, in respect to personal estate, they shall all be taken as one will, and admitted to probate; and the court will endeavour to reconcile them together so that they may all answer as near as possible the intention of the testator.

2 Atk. 87, Stone v. Evans. See 3 Ves. J. 160, Coxe v. Basset; 5 Ves. J. 280, Beauchamp v. Earl of Hardwicke.

But this must be understood only where there are several papers partially disposing of the testator's property, and neither of which purports to be in itself a complete will. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both in the ecclesiastical courts. The last is the will. From the nature of the instrument it revokes the other. If the last purports to be the whole will, a complete, substantive will, they do not prove both. Unless there is something to show it was meant to be coupled with another instrument, it is not taken to be a codicil.

3 Mod. 208, Hitchen v. Basset; 4 Ves. J. 616, Crosby v. Macdoual.}

‖ Unless a will of personalty is made and proved according to the forms required by the nineteenth, twentieth, and twenty-first sections of the statute of frauds, 29 Car. 2, c. 3, above set out as to nuncupative testaments, or unless it is the case of a soldier on actual military service, within the twenty-third section, such will of personalty must, under the operation of the statute, be in writing.

Rob. on Wills, 1, 183.

But it may be effectual without the name or seal of the testator, provided the handwriting can be proved: and it is good in the handwriting of another person, if signed by the testator, or without his signature, if it can be shown to have been made according to his instructions, and to have received his approbation.

Godolph. O. L. part 1, c. 21; Comyn's R. 452; Gilb. R. 260; 2 Phill. R. 351; 1 Phill. R. 365; ꞵWatts and Leroy, appellants, and the Public Administrator, respondent, 4 Wend. 168.ꞵ

As to the *form* of the instrument, the ecclesiastical courts are not scrupulous. A memorandum, or scrap of paper, though unsigned and undated,

written by a person in contemplation of death, and with a design to make it operative after that event, may be proved as testamentary.

See the cases stated in Linbury v. Hyde, Com. R. 452; Cox v. Basset, 3 Ves. jun. 158; Matthews v. Warner, 4 Ves. 200; Harris v. Bedford, 2 Phill. R. 177; Chaworth v. Beach, 4 Ves. 565; Thomas v. Wall, 3 Phill. R. 23; Friswell v. Moore, 3 Phill. R. 135.

But if the paper is left unfinished by the testator when he had an opportunity of finishing it, or if it carry on the face of it evidence of an intention to perfect it by some further solemnity, it will not be received as a testamentary disposition.

Griffin v. Griffin, cited 4 Ves. 197; and see 9 Ves. 249; 1 Dow. R. 437; 1 Meriv. 503. β See Harrison v. Rowan, 3 Wash. C. C. R. 580.ℊ

But the mere intention to have the paper copied is not such a further solemnity, if the testator is prevented by death from executing a fair copy.

Huntington v. Huntington, 2 Phill. R. 213; and see 3 Ibid. 109; β Dunlop v. Dunlop, 10 Watts, 153.ℊ

The mind and intention apparent in the paper are every thing, and the form is comparatively nothing.

See Nichols v. Nicholls, 2 Phill. R. 180.

Even if a testator, by a paper subsequent to his will, say that he has bequeathed property by the will, which is not bequeathed by it, the paper may be proved as a testamentary paper, and the property may pass by it. And if the instrument is in form of a deed of gift, if its purpose is testamentary and not to operate till death, the Ecclesiastical Court will grant probate of it.

Druce v. Denison, 6 Ves. 397; Thorold v. Thorold, 1 Phill. R. 1; and see 2 Ves. & B. 378; 1 Phill. 216; 2 Phill. 575.

No particular materials are requisite for the writing of the paper; it may be in pencil or in ink; but when the question is, whether it is a final testamentary disposition, or a mere memorandum, preparatory to some formal disposition, the circumstance of its being in pencil or ink is material: and the will may be in the shape of answers to questions, provided it appear to be spontaneous.

1 Phill. 1; 2 Phill. R. 173; 1 Phill. R. 33.

It has been regretted by Lord Eldon, in a case where the testator left four inconsistent testamentary papers, and probate was granted of all of them, that the provisions of the statute of frauds do not apply to wills of personalty.

5 Ves. 280.‖

See titles "EXECUTORS AND ADMINISTRATORS" and "LEGACIES," and Burn's Ecclesiastical Law, tit. *Wills*, (8th edit.)

III. *What shall be sufficient Proof of a Will.*

A written will, when it is written with the testator's own hand, proves itself, and therefore needs not the help of witnesses to prove it;(*a*) and for this cause, if a man's will be found written fair and perfect, with his own hand, after his death, although it be not subscribed with his name, sealed with his seal, or have any witnesses to it, if it be known or can be proved to be his hand, it is held to be a good testament, and a sufficient proof of itself; but if it be sealed with his seal, and subscribed with the name of the testator, and can be proved by witnesses, it is the more authentic; and

when it is found amongst the choicest evidence of the testator, or fast locked up in a safe place, it is the more esteemed; for if it be written in another hand, and the testator's hand and seal, or one of them, not to it, although it be found in such a place as before, yet some proof will be expected of it further by witnesses in that case; and if writing be found under the testator's own hand, yet if it be but a scribbling writing, written copywise, with a great distance between every line, without any date, in strange characters, with many interlineations, and lying amongst his void papers, or the like; this will not be esteemed a sufficient will, nor a good proof of it, but it shall be accounted rather a draft or image of the testator's will, for a direction to him after to make his will by; and yet if it can be proved that the testator did declare himself that this should be his will, this will be a good will, and a good proof of it.

Swinb. part 4, § 28, and part 7, § 13. β (*a*) When the will is written wholly by the testator himself, it is said by the civilians to be an holograph will or testament. See Civil Code of Louisiana, art. 1581; 5 Toull. n. 357; 1 Stuart's (L. C.) Rep. 327.ϑ N. B. The law in these particulars, with respect to wills of *lands*, &c., is altered by 29 Car. 2, c. 3, before taken notice of, which makes it necessary for the will to be subscribed by the testator, or some one in his presence, and to be subscribed in his presence by three witnesses. β See Harrison v. Burgess, 1 Hawks, 384.ϑ

If it be proved, that the testator said his testament was in such a schedule, in the hands of J S, and J S produce a writing, deposing it to be the same, this is a sufficient proof: but if he says withal, it is written with his own hand, then it seems some other proof, as by comparing hands, or the like, that it is his hand wherein it is written, will be expected.

Swinb. part 4, § 28.

If the witnesses will prove the writing produced to be the last will of the testator, or that he said it was, or it should be his last will, or that it was the same writing that was showed to them, and whereunto they are witnesses, although they never heard it read, or set their hands to it, it is a sufficient proof.

Swinb. part 4, § 28.

Where there is no question or opposition moved or had about or against a will, there the oath of the executor alone is esteemed a sufficient proof of it, and in that case regularly no other proof is required; and where more proof is necessary, it is in the discretion of the ordinary what proof to admit or allow; and those witnesses, for number, nature, and quality, or such other proof that he deems and accepts for sufficient, is sufficient; and the will so proved by such witnesses, or such other proof, is sufficiently proved.

{ *Two* witnesses, at least, are essential, in Pennsylvania, to the proof of every testamentary writing. And that seems to be also the law of England. 1 Dall. 278, Lewis v. Maris.}

[The doctrine above stated applies only to a will of personal estate; for if a bill be brought to establish a will of real estate against an heir, all the witnesses, if living, must be examined as to the sanity of the testator. And this rule is so strictly insisted upon by courts of equity,(*a*) that they will not dispense with it, though the heir at law, by his answer, state, that he believes the will to have been duly made, &c.

Ogle v. Cook, 1 Ves. 177; Grayson v. Atkinson, 2 Ves. 454; Townshend v. Ives, 1 Wils. 216; ‖ Harris v. Ingledew, 3 P. Wms. 92; and see Powell v. Cleaver, 2 Bro. C. C. 504. And Lord Eldon, C., held, that on an issue *devisavit vel non* directed by the Court of Chancery, all the witnesses to the will must be examined Bootle v. Blundell, Coop. C. C. 136; 19 Ves. 494, S. C.; and see Wood v. Stane, 8 Price, 613. But in a late case, where on such an issue only one witness was examined, Sir J. Leach,

M. R., refused the heir-at-law a new trial on that ground. Wright v. Tatham, 1830.‖

(*a*) Potter v. Potter, 1 Ves. 274. The discovery of the insanity of the testator has occasioned the setting aside of a will, even after twenty years' possession under it, and that too against a purchaser. Squire v. Pershall, 8 Vin. Abr. 169, pl. 13.]

‖ Where the evidence proves the execution of the will, but the witnesses have not been examined as to the sanity of the testator, the cause will be adjourned at the hearing, and liberty given to exhibit an interrogatory to prove his sanity.

Abrahams v. Winshup, 1 Russell, 526.

A will of real estate cannot be proved on a reference before the master.

Lechmere v. Brazier, 2 Ja. & W. 289.‖

All persons, male and female, rich and poor, are esteemed competent witnesses to prove a will, save only such as are infamous, as perjured persons, and the like; and such as want understanding and judgment, as children, infants, and the like; and such as are presumed to bear affection, as kindred, tenants, servants, and the like.(*a*) A legatee is reputed a competent witness to prove any other part of the will but his own legacy, or to prove any thing against himself touching his own legacy, but not otherwise; and therefore, where there are two witnesses of a will, wherein either of them have somewhat bequeathed unto himself, this will cannot be sufficiently proved for those legacies, but for the rest of the will it may be sufficiently proved. But see *posteà*.

Swinb. part 4, § 24. ‖(*a*) *Qu.* Whether the official signature of a vice-consul abroad to a certificate on the will, is a sufficient signature as a witness within the statute. 11 Ves. 240.‖ β See as to the qualification of the witnesses to a will, Hampton v. Garland, 2 Hayw. 147; Eelbeck's devisees v. Granberry, 2 Hayw. 232; Bateman v. Mariner, 1 Murph. 176; Martin v. Hough, 2 Hawks, 368; Daniel v. Proctor, 1 Dev. 428. β

[It has been a considerable question, who those witnesses were that are described in the act by the word "credible," as will appear from the following cases: T I, seised of hereditaments in fee, made his will, and thereby devised the same to W H, and his heirs, and signed, sealed and published the will in the presence of three witnesses, who subscribed the same. One of the witnesses was W H, the devisee. It was objected, that this devise was void, W H not being a credible witness thereto under the statute of frauds. On the part of the devisee it was contended, that the will was good notwithstanding the statute, for the devisee was a man of indisputable credit: that, though he could not be sworn upon a trial, yet it could not be said but that there were three witnesses to the will, and that the will had been well proved by the other two witnesses: that there was a difference between a matter which went to the credit of a witness's testimony, and a matter which went in bar of it; that the former excluded persons from being witnesses, as if a man were attainted of treason, or convicted of perjury or forgery, or any other matter of attaint; but that, where there was only an interest which barred him from being a witness, but did not touch his credit, it was otherwise: that the intent of the act was to prevent perjuries; but this could not be within the mischief of the statute; because the devisee, being a witness, could not be sworn and examined upon it; and therefore the case was out of the statute.

Hilliard v. Jennings, Com. R. 91; S. C., 1 Freem. 510; 1 Ld. Raym. 505, Ca. B. R. T. W. 3, 276, Carth. 514. *Notâ.* In the last reporter, this case is misstated in several points; particularly by stating that his credibility at signing depended upon his competency at law, without stating why the latter, viz.: the competency at law,

was the criterion of the former, viz., the credibility at signing; namely, that no person who would be incompetent to prove a will on a trial could be credible to attest it upon the execution. And also by narrowing his conclusion to the very case before him, by saying, "the will was void *quoad* the devise, and as to the devise:" from whence it is natural to infer, that it might have been good as to any other devise. Whereas, if he had stated the general proposition or principle, the reader could not have been misled. The reason why the emphasis is laid on that devise is, that, in fact, all the rest of the will relates to personalty, respecting which the will was clearly good.

But it was argued on the other side, and so held by the court, that this will was not executed according to the statute of frauds; for that a man who could not be a witness, which was the plaintiff's case, could not be a credible witness: that the intent of the act was to prevent frauds as well as perjuries; which intent would be evaded if the devisee should be admitted to be a witness, for he, being a party interested, might be induced to use fraud; and it was said, that the statute appointed three witnesses, &c., to the end that the transaction might be in such a solemn and notorious manner, that they might see that the devisor, being infirm as well in understanding as in body, as all men generally *in extremis* were, did not suffer any imposition; but that, *if persons who could not give evidence of their subscription* should be admitted to be credible witnesses, it was to admit so many dead letters to be witnesses, which entirely evaded the intention of the act; and upon this point judgment was given against the devisee.]

A testator by his will devised lands, and gave to the wife of John Hailes an annuity of 20*l.* a year, to her sole and separate use; and to J. Hailes and his wife each of them a legacy of 10*l.*, and charged his whole real and personal estate with the payment of all his legacies and annuity: J. Hailes was one of the subscribing witnesses to this will; the legacies and satisfaction for the annuity were tendered and refused, and the question now was on a special verdict, whether this will was good and well attested within the statute of frauds and perjuries? The court were of opinion, that the will was not properly attested, as Hailes was interested, and therefore not a credible witness; and gave judgment for the plaintiff, the testator's heir at law.

MS. Rep. Anstey v. Dowsing, Mich. 1744, B. R.; [2 Stra. 1253, S. C. This cause was afterwards carried on appeal to the Exchequer-chamber, where there was a difference of opinion among the judges: but the parties compounding, it was never determined. 1 Ves. 503.]

[On a bill for establishment of a will in the case of an infant, the objection taken was, that it appeared, on examination on the interrogatories, that one of the witnesses to the will was a creditor for a bill of fees and disbursements, and had not released. It was insisted, that, on an account taken, he would be found not to be a creditor. The Lord Chancellor sent it to the master, to inquire whether he was so; then it was objected, that the condition of the witness, as was determined in the case of Anstey and Dowsing, must be taken to be at the time of attestation; and that if interested then, he could not be a good witness. It was answered, that if that doctrine prevailed, it would overturn many wills, for servants were often made witnesses, who generally had legacies given them. But, on the master's special report, it appeared, that the witness to the will, at the time of the second examination, was not a creditor of the testator; and it not appearing, at the time of attestation, that he was, Lord Hardwicke said, he would not enter into a minute inquiry whether he was or not.

Price v. Loyd, 1 Ves. 503; Ibid. 374.]

(D) Of Wills in Writing. (*Proof of Wills.*)

In order to remove the doubts which had arisen who were to be deemed legal witnesses within the statute of 29 Car. 2, c. 3, § 5, it is enacted by 25 Geo. 2, c. 6, "That any person shall attest the execution of any will or codicil, which shall be made after the 24th June, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate,(*a*) other than and except charges on lands, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, &c., or appointment, shall so far only as concerns such persons attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void: and such person shall be admitted as a witness to the execution of such will or codicil, within the intent of the act of 29 Car. 2, notwithstanding such devise, &c.

‖(*a*) Sir W. Grant, M. R., held that a legacy to a subscribing witness to a will of *personalty* was void, since the statute extended to all wills and codicils. Lees v. Summersgill, 17 Ves. 509. But it has since been decided, that the statute does not extend to wills of personal estate. Brett v. Brett, 3 Addam's R. 210; Emanuel v. Constable, 3 Russell, 436.‖

"And it is also enacted, that in case, by any will or codicil made or to be made, any lands, tenements, or hereditaments are or shall be charged with debt; and any creditor, whose debt is so charged, hath attested, or shall attest, the execution of such will or codicil, such creditor shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act. That if any person hath attested the execution of any will already made, or shall attest the execution of any will, &c., made on or before the 24th June, 1752, to whom any legacy is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person before he shall give his testimony concerning the execution of such will, &c., shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest, upon tender made thereof; such person shall be admitted as a witness to the execution of such will, &c., within the intent of the said act. Provided that in case of tender and refusal, such legatee shall in no wise be entitled to such legacy, but shall be barred from his legacy; and in case of acceptance, such legatee shall retain his legacy, which shall have been so paid, satisfied, or accepted, notwithstanding such will or codicil shall afterward be adjudged to be void. That in case a legatee, &c., who hath attested the execution already made, or which shall be made on or before June 24, 1752, shall die in the testator's lifetime, or before he shall have received or released or refused (on tender) his legacy, such legatee shall be a legal witness to the execution of such will, &c., within the intent of the said act of 29 Car. 2; proviso, that the credit of every such witness so attesting, &c., and all circumstances relating thereto, shall be subject to the consideration and determination of the court and the jury before whom any such witness shall be examined, or his testimony or attestation made use of; or of the court of equity in which his testimony or attestation shall be made use of; in like manner as the credit of witnesses in other cases ought to be considered of and determined. No person to whom any beneficial estate, interest, gift, or appointment shall be given or made, which is thereby enacted to be null and void, or who shall have refused to receive any such legacy or tender as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand, or take possession of or receive any profit or

benefit of or from any such estate, &c., given by any such will or codicil; or demand, receive, or accept from any person, any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever. This act not to extend to the case of any heir at law, or of any devisee in a prior will or codicil of the same testator, executed and attested according to the act of 29 Car. 2, or any person claiming under them respectively, who has been in quiet possession for two years next preceding the 6th May, 1751, as to such lands, tenements, or hereditaments, whereof he has been in quiet possession as aforesaid. This act not to extend to any will or codicil, the validity or due execution whereof hath been contested in law or equity by the heir of such devisor, or the devisee in any such prior will, or will or codicil so contested, or any part thereof, or for obtaining any codicil, for recovering the lands, &c., mentioned to be devised in any other judgment or decree relative thereto, on or before the said 6th of May, 1751, and which has been already determined in favour of such heir at law, or devisee in such prior will or codicil, or any person claiming under them respectively, or which is still depending, and has been prosecuted with due diligence; but the validity of every such will or codicil, and the competency of the witnesses thereto, shall be adjudged and determined in the same manner as if this act had never been made. No possession of any heir at law, or devisee in such prior will or codicil as aforesaid, or of any person claiming under them respectively, which is consistent with, or may be warranted by, or under any will or codicil attested according to the intent of this act, or where the estate descended or might have descended to such heir at law, till a future or executory devise by virtue of any will or codicil attested according to this act, should or might take effect, shall be deemed to be a possession within the intent of the clause herein last contained. This act shall extend to such of the British colonies in America where the 29 Car. 2 is by act of assembly made, or by usage received as law; or where by act of assembly or usage the attestation and subscription of a witness or witnesses are made necessary to devises of lands, &c., and shall have the same force and effect in the construction of, or for the avoiding of doubts upon the said acts of assembly, and laws of the said colonies, as the same ought to have in the construction of, or for the avoiding doubts upon, the said act in England. Provided always, that as to the cases arising in any of the said colonies, no such devise, legacy, or bequest aforesaid shall be made null and void by virtue of this act, unless the will or codicil whereby such devise, &c., shall be given, shall be made after March 1, 1753."

[But, notwithstanding this statute, the question respecting the credibility of witnesses was again brought under consideration in the Court of King's Bench on a special verdict, in the case of Wyndham and Chetwynd. In that case W C being seised of lands, &c., made his will and a codicil thereto, bearing date 14th May, 1750;(*a*) and after devising certain parts thereof in the will, charged the residue of his real and personal estates with the payment of all his just debts, legacies and encumbrances. The will and codicil were duly executed in the presence of, and subscribed by, S S, R B, and I H.—S S and I H were attorneys at law, and had been employed by W C, in or about the year 1747, to solicit a private act of parliament, and charged him as debtor in their books for the fees and expenses of soliciting thereof, the sum of 318*l.*, and the charge continued so until and after the death of W C. Some time after which S S and R B delivered a

bill for passing this act to the trustees appointed in the act for the purposes therein mentioned: there was a clause in the act for payment of the expenses attending the same, and before the examination of S S and R B as witnesses on this ejectment, there was received from the trustees the sum of 302*l.* 4*s.* 8½*d.*, and the trustees were willing to have paid the remainder of the demand, if it had not been for a miscalculation. There was likewise a current account open and subsisting between S S, R B, and W C for other business, on the balance of which account, if stated at that time, S S and R B were indebted to W C 138*l.* 14*s.* 10*d.* Also at the death of W C there was due and owing from him to I H the other subscribing witness, who was his apothecary, 18*l.* 5*s.* 5*d.*, 11*l.* whereof were due on the 25th December, 1749, on simple contract; W C dieth on 17th May, 1750. There were mortgages upon W C's estates at the time of his signing the said will and codicil, and of his death, to the amount of 24,000*l.* And at the time of his death he owed 1600*l.* upon bond, and 2874*l.* upon simple contract. His personal estate then amounted to 13,972*l.*, and was sufficient to pay all the simple contract and bond debts. The estates in mortgage were of sufficient value to discharge the encumbrances thereupon. The executor of W C paid I H, one of the witnesses, the sum of 18*l.* 5*s.* 5*d.* after W C's death and before his examination in the cause. Upon these facts the question was, Whether these paper writings, or either of them, were or were not duly executed, so as to pass lands? This depended upon two questions; first, Whether the facts, as stated, did make *these* interested witnesses, and render them not credible? Secondly, if so, Whether the subsequent circumstances did not remove the objection, and re-establish their credibility? On the first it was argued for the devisee, that these witnesses were no legatees, and derived nothing from the gift or bounty of the testator; that they were justly entitled to payment of their debts, though no will had ever been made; that the personal assets were the proper fund for them to resort to, and that it was sufficient to pay their demands, therefore they were not interested in the charge on the real estate. On the second, it was contended that they were competent witnesses at the time of the examination, their debts being then discharged. That the word *credible* in the statute 29 Car. 2, c. 3, was an ambiguous expression, and capable of many senses, but there seemed to be a parliamentary exposition thereof in the statute of the 4th and 5th Anne, c. 16, § 14, whereby three witnesses were required to authenticate a nuncupative will, and it was declared, that such as were good witnesses in trials at common law should be deemed good witnesses to establish a nuncupative will. Now allowing the same exposition to take place on the statute of frauds, then, as these witnesses would be unexceptionable on a trial at law in respect of interest, so they would be competent, and, therefore, credible witnesses to the present devise. On the other side, it was argued for the heir at law, that, at the time of the attestation, the witnesses were interested, and therefore incompetent; and that *then*, and not the time of examination, was the proper time of inspecting their credibility, else it would open greater opportunities of fraud and perjury than existed before the act; that it would be setting up witnesses to hire, and would put the validity of a will in the power of the witnesses, by releasing or not releasing their interest. That if a witness was unexceptionable at the time of attestation, and afterwards became infamous or insane, the will was nevertheless a good will, which proved that his condition at the time of attestation was alone to be regarded:

that the word credible meant something more than competent; that the law required competency before, and it was not to be imagined that the learned compiler of this statute, Lord Hale, would put in a word that at best was superfluous; that in the statute of the 13th Car. 2, against deer-stealing, and in all the game laws, the expression of credible witnesses was used, which had always been understood to mean more than competent, and to give the justices a discretion, whether they would convict upon such testimony or not, though the witnesses were, in law, strictly admissible; and the cases of Hilliard and Jennings, and Anstey and Dowsing, were cited. After the court had taken some time to consider of it, they all agreed, that the will was *duly* attested by three credible witnesses. And Lord Mansfield(*b*) delivered a very elaborate judgment, in which he took occasion to enter very fully into the discussion of the meaning of the word "credible" in the statute of frauds; which his lordship considered as capable of being conferred on an interested witness by payment or a release.

Wyndham v. Chetwynd, 1 Burr. 414. {See 1 Johns. Ca. 163, Jackson v. Woods.} ‖(*a*) Before the time when the statute 25 G. 2, c. 6, took effect.‖ (*b*) In a subsequent case it is stated that Lord Mansfield, previous to his delivering his opinion in the last-mentioned case, declared, that *it* was *his own*, and he was *personally* answerable for all its errors; the judgment of the court being *general*, that they held the will duly executed according to the statute. Lord Camden, *arg.* in Doe v. Kersey, *infrà*.

John Knott, by a paper-writing purporting to be his will, devised his real estates to his wife for life, and, after the decease of his wife, devised certain hereditaments, therein particularly described, to trustees and their successors for ever, upon trust to apply the rents and profits thereof to such poor people within the lordship of Maulsmeaburn as he therein named, viz., indigent orphans under ten years of age, unable to labour, poor aged people utterly past labour, poor impotent people, lame or blind, and who could not labour; and to put out the children of such poor people as above, either sons or daughters, apprentices as soon as they were fit for it. This paper-writing was signed, sealed, and published by the said John Knott, in the presence of Henry Holme, Robert Burra, and John Mitchell, who subscribed the same in the presence of the devisor. Henry Holme and Robert Burra were two of the trustees above named; and they, and also John Mitchell, the other subscribing witness, were, at the time of attesting, and long afterwards, seised in fee-simple of lands, &c., within the lordship and township of Maulsmeaburn aforesaid, and during the time aforesaid were possessed of and occupied the same, and inhabited within the lordship; the lordship of Maulsmeaburn was a large district, and maintained its own poor, and the witnesses to the will were chargeable and taxable, and were actually charged, assessed, taxed, and paid towards the poor, and all other taxes of the said lordships. It appeared that Henry Holme and Robert Burra had, previous to the time of the trial, released all their interest under the said paper-writing, purporting to be the will of the said John Knott, to the other trustees therein named; and also that they, and John Mitchell the other witness, had severally conveyed away and disposed of all their respective estates and interest lying in the within lordship and township of Maulsmeaburn before the trial. And the question was, Whether this paper-writing, purporting to be the will of John Knott, was sufficient to pass the hereditaments in manner above mentioned? which depended upon the question, Whether the release and disposition of their respective estates and

interests had restored the credit of the witnesses? for, if not, it must fall to the ground, as the objection to it was not cured by the act of the 25 G. 2. And it was held by Clive, Bathurst, and Gould, against the opinion of {[1]} Pratt, C. J., that a witness, incompetent at the time of attestation, might purge himself afterwards, either by release or payment, and become competent by the rule of law. But the cause was afterwards, to avoid any further litigation, adjusted by agreement, and the parties divided the estate between them.

Doe on dem. of Hindson v. Kersey; 4 Burn's Eccl. L. 88. ‖ See Clarke v. Gannon, 1 Ry. & Moo. Ca. 31.‖ {[1]} His argument in this case is inserted in 1 Day, 41, n.}

‖ Where a witness was interested under the will at the time of his examination, though he was not so at the execution of the will or at the death of the testator, Lord Thurlow held him a good witness without argument.

Brograve v. Winder, 2 Ves. 634.

In a late case, A B by his will, devised an estate to M B, for life; and at her decease to E H, and her heirs for ever. T H, one of the three attesting witnesses, was the husband of E H, at the time of the attestation. The testator died shortly after making the will, leaving M B and E H, and the witness T H, surviving. E H died in the lifetime of M B, leaving T H, her husband, surviving, and the plaintiff, her eldest son and heir at law. T H died in 1819, and M B, the first devisee for life, in 1820. And the question was, Whether the will was duly attested on the ground of the interest of T H, the witness, in right of his wife's remainder under the will. For the plaintiff it was contended, upon the authorities of Holdfast dem. Anstey v. Dowsing, Wyndham v. Chetwynd, and Hindson v. Kersey, that a party having an interest under a will, but divesting himself of it previous to his examination, might be a witness to prove the will; and consequently, that T H, if he had been alive, might have been called as a witness, since he derived no benefit, his wife having died before the life-estate of M B, was determined: and even that if he took any benefit under the will, the statute 25 G. 2, c. 6, extinguished it. For the defendant it was argued, that T H was not a credible witness, since he had an interest at the time of his attestation; and that the statute could not extinguish the interest, since it was his wife's, and not legally his own. The Court of King's Bench gave a certificate that the will was not duly executed. *Quære*, if T H had lived, whether he might have been a witness to prove the will?

Hatfield v. Thorp, 5 Barn. & A. 589.‖

But a legatee may be a witness against a will; for the reason why a legatee is not a witness for a will being, because he is presumed to be partial in swearing for his own interest, it follows that a legatee, when he swears against a will, swears against his interest, and so is the strongest evidence.

Oxendon v. Penrice, Salk. 691, 695. β To exclude the testimony of a subscribing witness, his interest must be derived from the will itself. Allen v. Allen, 2 Tenn. R. 172.β

And if it stand indifferent to the witnesses, whether the will, under which they are legatees, and to which they are witnesses, be valid or not; the witnesses, though legatees, are credible.

β As to who may or may not be examined as a witness to a will, see Jackson v. Betts, 6 Cowen, 377; Dan v. Brown, 4 Cowen, 483; Jackson v. Vickory, 1 Wend. 406; Jackson v. Laguere, 5 Cowen, 221; Jackson v. La Grange, 19 Johns. 386; Jackson v. Thompson, 6 Cowen, 178.β

Thus, a devisee died on the 10th of February, 1746, having made a

will, dated 15th of May, 1746, of his whole estate, real and personal, charged with debts and legacies: the three subscribing witnesses, as being in his service at his death, had legacies; one 30*l.* a year for life, the two others pecuniary legacies; all three released the 2d of February, 1746. The testator had also made a former will on the 20th of December, 1744, attested by three disinterested persons, under which the three subscribing witnesses to the will of 1746 would have had the same legacies. A bill was brought in Chancery to have the latter will established. It was contended, that notwithstanding the will of 1744, (which the testator had revoked, as he thought, effectually, and might probably have cancelled,) it was a benefit to the witnesses, *at the time of subscribing*, to have a legacy under the latter will. But the Lord Chancellor was clearly of opinion, that these were good witnesses; for, at the death of the testator, it was indifferent to them which will prevailed; and his lordship declared the will of the 15th of May, 1746, to be well proved, established it, and decreed the trust.

Lord Ailesbury's case, cited 1 Burr. 427. ‖This was before the stat. 25 G. 2, c. 6.‖

The question on a special case reserved at the assizes, was, Whether a person who, before the time of attestation, had been indicted, tried, and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping, was a sufficient witness within the statute? The whole Court of Common Pleas were clearly of opinion, after three arguments at the bar, that he was not a competent witness.

Pendock v. Mackender, 4 Burn's Eccl. Law, 93, H. 28 G. 1; {Willes, 665, S. C.; 2 Wils. 18, S. C.}

‖ Where a witness was insane, proof of his handwriting was allowed, for he was considered as dead; and so also where the witness was abroad.

Carrington v. Payne, 5 Ves. 404; Bennet v. Taylor, 9 Ves. 381.‖

β When the subscribing witness is out of the jurisdiction of the court, his handwriting may be proved as if he were dead.

Engles v. Bruington, 4 Yeates, 345.β

When the subscribing witnesses are dead, and no proof of their handwriting can be obtained, as must frequently happen in the case of old wills, it will be sufficient to prove the signature of the testator alone.

In a case where the handwriting of two subscribing witnesses was proved, and no account could be given of the third, the will being above thirty years old, and the testator having been dead for twenty years, an objection was made to the proof of the will; but the Master of the Rolls said, he could not see any distinction in this respect, between a will and a deed, except that the former, not having effect till the death, wants a kind of authentication which the other has; that is from the nature of the subject: but in this case, he added, I think the proof sufficient; for, in a late case in the Court of King's Bench, Cunliff v. Sefton, an inquiry of the same kind was held sufficient. The Master of the Rolls therefore held, that the execution of the will had been sufficiently proved.

Mackenzie v. Frazer, 9 Ves. 5; and see James v. Parnell, Turner & Russ. 417; 2 East, 182.

In the case of Calthorpe v. Gough and others, at the Rolls, a will, thirty years old, (reckoned from the date of the will, not from the testator's death,) was not proved by witnesses; and it was said at the bar, that proof was not

necessary on account of the age of the will; and in support of this, a case of Mackery v. Newbold was cited, in which Sir Lloyd Kenyon, then Master of the Rolls, is said to have decided, that a will, above thirty years old, should be read without proof, although the testator had died very recently. That point, however, was not decided in the case of Calthorpe v. Gough, because the plaintiff, the heir at law, admitted the will, and claimed under it. In the late case of Lord Rancliffe v. Parkynse, the Lord Chancellor is reported to have expressed an opinion, that a will, thirty years old, if there has been possession under it, proves itself when the attestation records the fact of the signing of the witnesses in the testator's presence; and if the signing is not sufficiently recorded, yet that the fact of possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing by the witnesses. The general rule seems to be, that a will, thirty years old, unless there has been possession under it, ought to be proved like any other will.

4 Term R. 707, n. (*a*); 6 Dow. R. 202. See Phillips on Evidence, vol. i. 503.‖

[The attesting witnesses may, upon examination, deny the facts, which, upon the face of the instrument, they are presumed to have attested. But in this case, the devisee may produce evidence to contradict their testimony.(*a*)

Hudson's case, Skin. 79; Pike v. Badmerino, 2 Stra. 1096; Lowe v. Jolliffe, 1 Black. R. 365. Where, on an ejectment brought upon a will, a woman had sworn against her own attestation, Yeates, J., said, that she ought not to have been admitted to give this evidence. And Lord Mansfield observed, that this would not invalidate the will; for that there were cases where one witness had supported a will, by swearing *that* which the other two witnesses attested, although those two had denied that they did so. And, in the principal case, a new trial was granted, the verdict having been given against the devisee apparently upon this ground. Goodtitle v. Clayton, 4 Burr. 2224.] ‖(*a*) If an attesting witness to a will impeach its validity on the ground of fraud, and accuse other subscribing witnesses who are dead of being party to the fraud, the party claiming under the instrument may give evidence of their general good character. Doe v. Stevenson, 3 Esp. Ca. 284; 4 Ibid. 50; 1 Camp. 210.‖

Witnesses have been examined to prove the testator's intent.

2 Ld. Raym. 1326, Cliffe et al. v. Gibbins et al. [So, Mallabar v. Mallabar, Ca. temp. Talb. 79.]

The probate of a will cannot be controverted at common law.

1 Ld. Raym. 262, Sir Richard Raine's case. *N. B.* Though neither the courts of law nor the courts of equity can determine the validity of a probate adversarily; yet if it comes in incidentally, and the incident is admitted by the parties, those courts may determine it, and hold the parties bound by the admission. Atk. 630, Sheffield v. The Duchess of Buckingham. β The probate of a will is a judicial act, which cannot be called in question in a collateral suit. Bailey v. Bailey, 8 Ohio, 239; Card v. Grinman, 5 Conn. 164.β

A recital of a will in a copyhold admittance is evidence against any but the heir.

1 Ld. Raym. 735.

Qu. If the probate or register of a will be evidence to prove a pedigree.

1 Ld. Raym. 745. ‖See Bull. N. P. 246.‖

According to Holt, C. J., the registrar's book is good evidence to prove a will concerning lands.

Ld. Raym. 631, St. Leger v. Adams. ‖See Bull. N. P. 246.‖

Parol evidence is not admitted to contradict the words of a will.

Ld. Raym. 1261, Lowfield v. Stoneman, et Cas. temp. Talb. 240, Brown v. Selwin; β Avery v. Chappel, 6 Conn. 270; Spalding v. Harrington, 1 Day, 8.ℊ ‖But it is admitted to explain a *latent* ambiguity, Cheney's case, 5 Rep. 68; Beaumont v. Fell, 2 P. Wms. 141; Thomas v. Thomas, 6 Term R. 676; Andrews v. Dobson, 1 Cox's Ca. 425; Careless v. Careless, 1 Meriv. 384; Price v. Page, 4 Ves. 680; Roberts, p. 111, c. 3, § 4; or to rectify a mistake or misdescription, Hewson v. Reed, 5 Madd. 455; Dobson v. Waterman, 3 Ves. jun. 308, note.‖

β The declarations of the testator, before and at the time of making his will, and afterwards, if so near as to be a part of the *res gestæ*, are admissible to show fraud in obtaining the will. But declarations made at a considerable distance of time after making the will, particularly if the will has been in the testator's possession all the time, are not admissible.

Smith v. Fenner, 1 Gallis. 170.ℊ

And proof of a will cannot be made against a man by the confession of his own witness, without the actual production of the will itself.

1 Ld. Raym. 730, Pyke v. Crouch.

An executor may be sued for a legacy where he proves the will, though he does not live in that diocese.

1 Ld. Raym. 847, Edgworth v. Smalridge.

A will was made in French and proved in French, and under it in the same probate the will was translated into English, but it appeared to be falsely translated. It was objected, that the translation being part of the probate, and allowed in the spiritual court, it must bind; and the application must be to that court to correct the mistakes, which until then must be conclusive. But *per* his honour, nothing but the original is part of the probate; neither hath the spiritual court power to make any translation: and supposing the original will was in Latin, (as was formerly very usual,) and there should be a plain mistake in the translation of the Latin into English, surely the court would determine according to what the translation ought to be. And so it was done in this case.

1 P. Wms. 526, L'Fitt v. L'Batt.

β In Pennsylvania, the certificate of the register of wills, that a will of lands has been duly proved and approved before him, and a copy thereof annexed, is *primâ facie* evidence of such will, though a copy of the probate is not set out.

Logan v. Watts, 5 S. & R. 212; Dormick v. Reichenbach, 10 S. & R. 84. See Miller v. Carothers, 6 S. & R. 223; Coates v. Hughes, 3 Binn. 498.ℊ

‖ An executor or the wife of an executor taking no beneficial interest may be a witness to prove a will.

Bettison v. Bromley, 12 East, 250; Phipps v. Pitcher, 6 Taunt. 220; 1 Madd. 144. β When the executor derives no benefit under the will, he is a competent witness to establish it. Comstock v. Hadelyme Ecclesiastical Society, 8 Conn. 254.ℊ

β If either husband or wife be a witness to a will, containing a devise or legacy to the other, such legacy or devise is void, and the witness is competent.

Jackson v. Woods, 1 Johns. Cas. 63; Jackson v. Durland, 2 Johns. Cas. 314; Jackson v. Denniston, 4 Johns. 311.ℊ

And although he take an interest, he may be a witness for a devisee to establish the will as a will of real estate; for that does not prove it a good will of personalty.

Doe dem. Wood v. Teage, 5 Barn. & C. 335.‖

(E) Of Nuncupative Wills.

β Each of the witnesses to a will must separately depose to all the facts required to complete the chain of evidence.

Hock v. Hock, 6 S. & R. 47. See Mullen v. M'Kelvy, 5 Watts, 399.

Parol evidence that deceased had made a will in writing, and of the contents of such writing, insufficient as a will.

Clark v. Morton, 5 Rawle, 235.

Where the witness testified that she saw the testator sign the paper, and acknowledge it to be his act and deed; held, that this was sufficient proof of its execution as a will.

Loy v. Kennedy, 1 Watts & S. 396.

The inhabitants of a corporate town, to whom property is devised for the support of a school, are competent witnesses to support the will.

Cornwell v. Isham, 1 Day, R. 35.

In Tennessee, the sons of a devisor are competent witnesses to a will, provided none of the lands of the deceased are devised to them.

Allen v. Allen, 2 Tenn. 172.

One who holds a covenant of warranty from the testator is a competent witness to a will; the heir or devisee are equally liable to him.

Thompson v. Shoeman, 1 Bibb, 401.g

(E) Of Nuncupative Wills.

"By stat. 29 Car. 2, c. 3, § 19, for the prevention of fraudulent practices, it is enacted, 1. That no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses, at the least, that were present at the making thereof, and bid by the testator to bear witness that such was his will, or to that effect. *And by stat.* 4 *Ann. c.* 16, § 14, *it is declared, That all such witnesses as are and ought to be allowed to be good witnesses upon trial at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereto.*

"Nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his, her, or their habitation or dwelling, or where he or she has been resident for ten days or more next before the making of such will, except where such person was surprised or taken sick being from his own home, and died before he returned to the place of his or her dwelling.

§ 20. "That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

§ 21. "That no letters testamentary, or probate of any nuncupative will, shall pass the seal of any court, till fourteen days, at the least, after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow, or the next of kindred to the deceased, to the end they may contest the same, if they please.

§ 22. "That no will in writing concerning any goods or chattels, or personal estate, shall be repealed; nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of nouth

only, except the same be in the life of the testator committed to writing, and after the writing thereof read to the testator, and allowed by him, and proved to be so done by three witnesses at the least.

§ 23. "Provided that any soldier in actual military service, or any mariner or seaman (*a*) being at sea, may dispose of his movables, wages, and personal estates, as before the making of this act."

N. B. It has been ruled in equity, that before probate, a nuncupative will is not pleadable in any court against an administrator. 1 Ch. Cas. 192, Verborne v. Brewin. ‖ (*a*) For the regulations as to seamen's wills, see 55 G. 3, c. 60, and Burn's Ecc. L. tit. *Wills*, (8th edit.)‖

A being ill, desired B to make her will, who wrote down only names and initial letters to this effect, viz.: To Tho. West, 200*l.*, to Jo. Dev., 100*l.*, to Reb. Cro. 50*l.*, to self, 10*l.*, and to several other persons, in like manner, to above 400*l.*; which being more than her estate, B made an alteration in the second column, by subtracting part of the sums from some of the legatees, as set down in the second column, and then told A the sense of the proposed devises: there were two persons in the room that did not hear any thing that passed between A and B, but only heard the testatrix at last pronounce, that all was well. B went to a scrivener to have the devises drawn out at length and in form, and before she returned the testatrix died: the judge below pronounced for this will; but upon appeal to the delegates, it was reversed; and in this case it was agreed, that if the will had been written in words at length, so as they had carried a sense and meaning in themselves, it had been a good will; for that there was one witness that wrote it, and two that heard the testatrix pronounce that it was well: which would have been intended to have amounted to a second witness, in regard it appeared on all hands, by several witnesses, that the testatrix did then seriously dispose herself to make her will; and for that was quoted the case of one Pepper, where a person disposed herself to make her will, and dictated it to a person who wrote it down; and another, not called in as a witness, lay behind the hangings, out of curiosity; and yet such will was allowed to be good, being proved by these two witnesses: but they distinguished this case, because the will was not substantive, but was to take its sense from the interpretation of the witness; and so there would be innuendo upon innuendo, which made purely a nuncupative will: and as such, not being attested by the number of witnesses appointed by the statute of frauds and perjuries, the will and legacies were void.

1 Abr. Eq. Cas. 403. ß To entitle a nuncupative will to probate, the provisions of the law must be strictly complied with. Case of P. E. Yarnall's alleged will, 4 Rawle, 46. See Prince v. Hazelton, 20 Johns. 502.ȼ

Doctor Shallmer, by will in writing, gave 200*l.* to the parish of St. Clement's Danes, and after, Prew the reader coming to pray with him, his wife put him in mind to give 200*l.* more towards the charges of building their church, at which, though Dr. Shallmer was at first disturbed, yet after he said he would give it, and bid Prew take notice of it: and the next day he bid Prew remember of what he had said to him the day before, and died that day. Within three or four days after, the doctor's wife puts down a memorandum in writing of the said devise, and so did her maid. Prew died about a month after, and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor said to him about the 200*l.*, and purporting that he had put it in writing the same day it was spoken: but that writing which was men-

tioned to be made the same day it was spoken did not appear, and these three memorandums did not expressly agree. About a year after, on application by the parish to the commissioners of charitable uses, and producing these memorandums and proof by Mrs. Shallmer and her maid, they decreed the 200*l.* But on exceptions taken by the executors, the decree was discharged of the 200*l.*, and Lord Chancellor held it not good, because it was not proved by the oath of three witnesses; for though Mrs. Shallmer and her maid had made proof, yet Prew was dead; and the statute in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses.

1 Abr. Eq. Cas. 404.

A daughter deposits 180*l.* in the hands of her mother, (the defendant,) and afterwards makes her will in writing, and thereby devises several legacies, and makes her mother executrix, but takes no manner of notice of the 180*l.* Afterwards, by word of mouth, she desires her mother to give the 180*l.* to the plaintiff, if she thought fit, and then soon after died: the mother proved the will, and this bill was brought against her, to have the 180*l.* paid. The mother, by her answer, admits she had such a sum in her hands, that her daughter did make such a request to her, but that she left it to her election, whether she would give it to the plaintiff or not, by the very form of the devise: and insisted, that she did not think fit to give it to the plaintiff. And in this case it was agreed, that this was not good as a nuncupative will, being above 30*l.* and not reduced into writing within six days after the speaking, as the statute requires. 2dly, That if the defendant had insisted on the statute of frauds and perjuries, the court could not have relieved the plaintiff as upon a trust; but in this case the defendant having by answer confessed the trust, there was no danger of perjury from variety of proof, which was the mischief the statute intended to provide against; and therefore the court took it to be in nature of a trust, and decreed for the plaintiff: for the defendant expressly swore, she did not think fit to give it to the plaintiff, and that the testatrix had left her at liberty. But this decree was against the opinion of several at the bar, who thought it too hard on the election left in the mother: but the court principally relied on the case of Kingsman and Kingsman, where a man devised away an estate of 2000*l.* *per annum*, and upwards, from his son and heir to a bargeman; and by his will devised 20*l.* *per annum*, to his son, with this clause, that if he behaved himself well, and gave no trouble or disturbance concerning her will, that he might make it up 80*l.* if he thought fit: and the court decreed the 80*l.* *per annum* to the son. But note, the 80*l.* *per annum*, in the case of Kingsman and Kingsman, seems to have been decreed purely upon the circumstances and hardships of the case; but in the present case there were no such circumstances or ingredients of hardship on the plaintiff: but *quære*, for it seems to be a trust in the hands of the mother.

1 Abr. Eq. Cas. 404; Gil. Eq. R. 146, Jones v. Nabbs; ‖S. C. *nom.* Nab v. Nab, 10 Mod. R. 404.‖

‖ The dying person is required by the statute to bid the persons present bear witness that such is his will, or to that effect; and the statute, with respect to this as well as its other requisitions, hath always been strictly construed. Thus, in a late case, where a person in her last sickness called her children to her bedside, together with another individual who was in the

house, and declared to them her will as to the disposition of her property, without more in the case, though the credit of the witnesses was unshaken, the paper propounded as nuncupative was rejected for want of the *rogatio testium*, which ought to be explicit and particular.

Bennett v. Jackson, 2 Phill. R. 190;‖ β Brown v. Brown, 2 Murph. 350.ℊ

β A nuncupative will not made at the habitation of the deceased, nor where he had resided for ten days next preceding, but authenticated as the law requires, ought to be established notwithstanding he was very unwell when he left home, if afterwards he was taken more dangerously ill, and died where the will was made.

Marks v. Bryant, 4 H. & M. 91.

A man at his own house, on his death-bed, and in his proper senses, sent for a neighbour to make his will, who in his presence and that of a witness took notes for that purpose; the sick man requested the writer to make his will, and directed each note to be taken; a third witness was not present when the first witness began to take the notes, but was present afterwards, and heard some of the notes dictated; two of the witnesses swore that the notes, or most of them, were read to the decedent, but were not positive that the whole were, nor did the sick man, who was then in his senses, read them himself. After the first witness had made a draft of the will from the notes, the decedent was incapable of reading or hearing it read, being at that time delirious. Held, that the notes taken as aforesaid were a good nuncupative will.

Mason v. Durman, 1 Munf. 456.ℊ

(F) The Nature and Effect of a Will or Testament, and of a Codicil.

A WILL or testament is of that nature, that it differs much from other acts and deeds that men do and execute in their lifetime; for although it be made, sealed, and published in ever so solemn a manner, yet it has no life nor virtue in it until the testator's death; for it is a maxim in law, *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum vitæ exitum:* it is therefore resembled until death to the interlocutory sentence, and after death to the definitive sentence of a judge; and hence it is said, *sed legum servanda fides, suprema voluntas quod mandat fierique jubet parere necesse est.*

1 Inst. 112; 4 Rep. 61 b, Forse and Hembling's case. But N. B. though it does not take effect till after the testator's death, yet it is inchoate, though not consummate, from the execution of it; and to many purposes in law shall relate to the time of the making of it. 1 P. Wms. 97, Lord Bindon v. Earl of Suffolk.

And for this reason a man may alter or make void his will at his pleasure; and he may make as many new wills and testaments as he pleases, and there is no way to bar a man of this liberty.

Shep. Abr. part 4, p. 9, *voc. Test.*

And the latter testament always revokes and overthrows the former; but otherwise it is of a codicil, for a man may make as many of these as he will, and make no testament at all. Or, if he makes a testament, he may afterwards make as many codicils as he will, and one of them will not overthrow the other; for in the first case they must be all annexed to the letters of administration, and the administrator must perform them; and in the latter case they must be all annexed to the testament, and the executor must take care to perform them.

Lit. 168, Swinb. p. 1, § 5; Bro. *Test.* 20.

(G) How Wills shall be construed, &c.

A testament, therefore, is said to have three degrees. 1st, An inception, which is the making of it. 2dly, A progression, which is the publication of it. 3dly, A consummation, which is the death of the testator.

Shep. Abr. part 4, p. 9, *voc. Test.*

In grants, therefore, the first is of the greatest force, but in testaments the last is of the greatest force.

1 Inst. 112 b. But if the latter will cannot be found, or the contents of it are unknown, it is no revocation of the former. Show. Cas. in Parl. 146. [Vide *infrà.*]

But, when a testament is perfect by the death of the party, it as effectually gives and transfers estates, and alters the property of lands and goods, as acts executed by deeds in the lifetime of the parties; for hereby descents of lands are prevented. And a man may make estates in fee-simple or fee-tail, for life or years, of lands, tenements, rents, reversions, or services, as effectually as by deed; and these estates also will be good without any livery of seisin or attornment; and hereby also rents, and power to distrain for them, may be reserved, conditions created and annexed to estates or things devised.

Shep. Abr. part 4, p. 10, *voc. Test.*

And, therefore, they that take by devises of land, are said to take in the nature of purchasers.

And if, therefore, a tenant in tail makes a feoffment to the use of himself in fee, and after devises the same land to his wife in fee, and dies, the son is not remitted though the father dies seised, for the devise prevents the descent.

Dyer, 221, pl. 16.

(G) How Wills shall be construed. ‖General rules of Construction: and herein,—Of the admissibility of extrinsic Evidence to explain them.‖

β In all cases the intention of the testator is to govern, if it be not inconsistent with the policy of law.

Holmes v. Williams, 1 Root, 332; Lutz v. Lutz, 2 Blackf. 72; Finlay v. King's Lessee, 3 Peters, 346; Morton v. Perry, 1 Metc. 446; Jarvis v. Buttrick, 1 Metc. 480; Richardson v. Noyes, 2 Mass. 56; Davis v. Hayden, 9 Mass. 514; Homer v. Shelton, 2 Metc. 194; Lamb v. Lamb, 11 Pick. 371; Crocker v. Crocker, 11 Pick. 252; Hayden v. Stoughton, 5 Pick. 528; Bowers v. Porter, 4 Pick. 198.ℊ

It is to be observed, that where the words of a will have a plain sense, and no doubt is in any matter within or without the words, touching the matter of the devise, there the words of the will shall always be taken to be the intent of the devisor, and his intent to be what the words say.

2 And. 17, Lowen v. Bedd. ‖See 7 Ves. 391; 9 Ves. 205.‖

{And the words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise.

4 Ves. J. 329; 5 Ves. J. 401, 818; 7 Ves. J. 535.

Every word of a will must have a meaning imputed to it, if it is capable of a meaning without a violation of the general intent, or of any other provision in the will with which it may appear inconsistent.

4 Ves. J. 329, 698, 818; 5 Ves. J. 247; 6 Ves. J. 102.

General words in a will may be restricted, to render the whole will consistent.

6 Ves. J. 129; 7 Ves. J. 403; 10 Ves. J. 595.}

(G) How Wills shall be construed, &c.

That all the words of a will are to be carried to answer the intent of the devisor; but this is to be understood in cases where the intent of the party may be known by the words that are in the will.

2 And. 10, 11, 134; βGardner v. Wagner, Bald. R. 459.ℊ

βA will is to be construed according to the laws and usages of the country where the testator resided when he made it, unless there is something in the language which repels or controls such conclusion.

Harrison v. Nixon, 9 Peters, 483.ℊ

That if there are inconsistent and contradictory words in a will, some words must be rejected to make it sense. Thus, where a testator gave the interest of a sum of 6000*l.* to Mary Comfortle, his daughter, for her life, and after decease gave the money between Charles Comfortle her husband, and their children: and in another part of the will he said, "and in case there be no such child or children, I give it to Charles Comfortle and such children." Lord Chancellor rejected these latter words, as they were absurd and contradictory.

MS. Rep. Boon v. Comfortle, Pas. 24 G. 2, *in Canc.;* [2 Ves. 277, S. C. by the name of Boon v. Cornforth.] {"The rule with regard to cases of this sort is, if upon a general view of the will I can collect the general intention, or any one particular object, and there are expressions in the will in some degree militating with it, if I plainly see those expressions are inserted by mistake, I may reject them. But I cannot reject any words, unless it is perfectly clear they were inserted by mistake; and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention." *Per* Sir R. P. Arden. 5 Ves. J. 247, Sims v. Doughty; 6 Ves. J. 102; 3 Ves. J. 320.}

{Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context.

6 East, 486, Doe v. Micklem.

A mistake in a will cannot be corrected, or an omission supplied, unless it is perfectly clear, by fair inference from the whole will, that there is such mistake or omission. Where there is a clear mistake, or a clear omission, recourse is to be had to the general scope of the will, and the general intention to be collected from it.

4 Ves. J. 45, Mellish v. Mellish; Ibid. 57, Phillips v. Chamberlaine; 3 Ves. J. 362, Clarke v. Norris.}

A having a wife and no children, made his will and said,—lest it should please God that he should not return, he gave and devised a real and personal estate, or to that effect. He returns, has children, and dies, without altering his will: the plaintiff being a legatee, and there being a direction in the will for the sale of the real estate to pay his legacy, Lord Chancellor was of opinion that the disposition was merely contingent, and that no part of the will was to take effect but on the contingency of his return; and so avoided determining the principal question, how far the alteration of the testator's circumstances would be a presumptive revocation as to the real and personal estate; but as to the personalty, seemed to rely on the case of Lug and Lug; and as to the real estate, he said that the statute of frauds and perjuries made a material difference between that and the personal estate.

MS. Rep. Parsons v. Lenow, Hil. 22 G. 2, *in Canc.;* [1 Ves. 189, and Ambl. 557, S. C. by the name of Parsons v. Lanoe;] ‖1 Wils. 243, S. C.; and see Sinclair v. Hone, 6 Ves. 607; Johnstone v. Johnstone, 1 Phill. R. 485.‖

(G) How Wills shall be construed, &c. (*General Rules.*)

{A testator in the West Indies made a codicil as follows: "In case I die before I join my beloved wife, I leave to her all my property, 500*l.* to my brother D excepted." He had then taken leave of his wife, intending to go to England to solicit promotion; but that voyage being prevented by accident, he returned to her. They lived together there, and returned together to England. The testator afterwards went to Corsica, and from thence to Lisbon, where he died about three years after the date of the codicil. The codicil was held to be contingent, and not to have taken effect under these circumstances, the contingency referred to not having happened. And though the codicil had been proved in the ecclesiastical court, that was not considered conclusive; probate of the codicil not being refused except in a plain case.
6 Ves. J. 607, Sinclair v. Hone.}

That a will must have a favourable interpretation, and as near to the mind and intent of the testator as may be, and yet so withal as his intent may stand with the rules of law, and not be repugnant thereunto; it being a rule or maxim of law, *Quod ultima voluntas testatoris perimplenda est, secundum verum intentionem;* and that, *Sed legum servanda fides, suprema voluntas quod mandat fierique jubet parere necesse est.* In deeds, the rule of construction is, that the intention must be directed by the words; but in wills the words must follow the intent of the devisor; and such a construction is to be made of them as to make use of all the words, and not of part, and so as they may stand together, and have no contrariety in them.
Shep. Abr. part 10, *voc. Testament;* Bridg. 105, Standish v. Short.

That such a sense shall be made of a devise, that it may be for the profit of the devisee, and not to his prejudice.
Shep. Abr. part 11, p. 11, *voc. Test.*

That general and doubtful words in a will shall not alter an express devise before, nor carry any thing contrary to the apparent intent.
Shep. Abr. part 11, p. 11, *voc. Test.;* ‖8 Term R. 118; 6 Ves. jun. 129.‖

That the clauses and sentences of a will shall be severally transposed to serve the meaning of it. And construction shall be made of the words to satisfy the intent, and they shall be put in such order as that the intent may be fulfilled.
Shep. Abr. part 11, p. 11, *voc. Test.* ‖See Willes R. 1; 2 Ves. & B. 67; 2 Meriv. R. 386; 9 East, 267;‖ βReno's Executors v. Davis, 4 H. & M. 283.β

That no sense may be framed upon the words of a will, wherein the testator's meaning cannot be found.
Shep. Abr. part 11, p. 11, *voc. Test.*

That to give a thing to such a person to whom the law gives it, is as if it had not been given; and so a devise of a man's land to his heirs is void.
Styles, 148, 149.

That a construction of a will must be gathered out of the words of the will, and not by any averment.
Shep. Abr. part 11, p. 11, *voc. Test.*

That though a parol averment shall not be admitted to explain a will, so as to expound it contrary to the import of the words; yet when the words will bear it, a parol averment may be admitted. As, for instance, to ascertain the person, but in no case to alter the estate.
1 Freem. 292, Steede v. Berrier; 5 Rep. 68, Lord Cheney's case; [2 P. Wms. 137;

(G) How Wills shall be construed, &c. (*General Rules.*)

1 Ves. 231; 1 Atk. 411; 2 Ves. 216; 1 P. Wms. 674; 2 P. Wms. 142; Ambl. 175; 3 Ves. jun. 148. Parol averments are admitted to aid the exposition of a written will, not only where there is an ambiguity as to the person, or as to the subject matter devised, but also where words of equivocal import are used expressive of the quantity of interest, or extent of the subject matter of the devise. Thus, a testatrix by her will gave the following bequests: "I give to M P *the sum of* 500*l. stock in long annuities.* I give to M H *the sum of* 500*l. stock in long annuities;* I also give unto Miss I B *the sum of* 200*l. stock in long annuities, the* interest thereof *to accumulate, till she shall attain twenty-one, and then the whole* to be transferred *to her by my executors.* Also, *I give unto Miss H D the sum of* 100*l. stock in long annuities,* the interest *thereof to accumulate, until she attains twenty-one, and then the whole to be transferred to her by my executors:*— And all the rest and residue of my estate and effects, both real and personal, whatsoever and wheresoever, I give, devise, and bequeath the same, and all and every part thereof, unto my said two nephews M F and T F, their heirs, and executors, administrators, and assigns for ever." It turned out that the testatrix had only 120*l.* a year long annuities. And the question was, Whether the legatees should have the respective sums given to them raised by sale of so much of the stock as would produce the same; or whether they were entitled under the will to annuities of the sums respectively given them, and consequently to divide the 120*l.* a year between them, leaving nothing to the residuary legatees? And this depended upon the question, Whether, in this case, the court could let in averments of the state of the testatrix's property at the time of her decease? Upon the first hearing of the cause, Lord Thurlow was of opinion, that parol evidence could not be admitted; because, the testatrix having used words so near those a man of business would make use of to dispose of so much *per annum*, the court were bound to declare the legatees entitled to the things as described, viz., annuities. But, on a rehearing of the cause, his lordship changed his opinion. He said, he should have thought that had the will stood clear of all other criticisms, although it were not an accurate description of 500*l.* joint interest in the annuities, yet it was a sufficient one of 500*l.* stock in the long annuities; at the same time it was impossible not to observe that the expression "the sum of 500*l.*" was going out of the way. But accurate phrases were not called for; and if the words were found to express the intention of the testatrix, that was sufficient, and if it had stood by itself, it was sufficient to show what the words meant, "an annual sum of 500*l.*" The difficulty occurring was this, that she had been speaking of a sum of 500*l.*, which expression, if standing alone, ought not to be interpreted by any other context, but must take its *whole complexion* from the word *stock:* but, if it stood with the context to admit of any other construction upon it, he must consider what the testatrix meant by the whole of the words "the sum of 500*l.*, &c.," and the additional words "the interest thereof *to accumulate.*" According to the natural sense of the words "sum of 500*l. given to A at twenty-one, and the* interest *thereof to accumulate,*" he must suppose the first sum to be the principal sum, and the second the interest of the principal sum. It had been contended that the word "*stock*" in the annuities could not mean the annuity; because it would extend to the three per cents., which were annuities, but there the stock was denominative of the *capital* sums; otherwise as to the long annuities, they were denominated so by the annuity; and the circumstance of their being both annuities made it very probable, that if a person were to speak of it as a gross sum, he would speak of the stock, and not of the annuity merely. So far practice might warrant, that if the words had ended with annuities, without speaking of interest, there would have been no necessity for evidence to have controlled them: but the second part of the sentence, "and the interest thereof to accumulate," raised a doubt whether *she meant a sum* as producing interest, or the stock itself. The term interest was not a proper phrase, but this was not a grosser inaccuracy than those in the rest of the will: the word transferred had been relied on as a technical phrase, but it weighed nothing, because the thing to be bequeathed was not the stock, but the produce of the stock together with the stock itself. The interest, which was the growing produce of the legacy she meant to give, was to be laid out in order to accumulate, she must have meant by the word *annuity* something. There was no doubt if the word *stock* had been left out, but the meaning would be that the sum of 500*l. was to be disposed of in long annuities, and to make a produce,* and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arose, Whether the state of the testatrix's fortune was not applicable to the construction of the will? It appeared by some other parts of the will, that she was extremely anxious to make an ample provision for the family of the Fonereaus; considering then the situation of her fortune, it was perfectly

inconsistent to say, that she could mean to give *ten times more than she was worth* in legacies. His lordship's opinion therefore was, that the judgment must be reversed, and that he could let in the evidence of the value of the estate, not to *control the bequests* which the testatrix had made in words themselves distinct, nor to control a bequest which she had made of a subject which she had accurately described; but, because the words she had used in the description were, upon the whole of the context, uncertain *whether she intended it as the interest of the gross sum to accumulate*, or 500*l. per annum*. The peculiarity of this will furnished sufficient doubt to warrant the admission of collateral evidence to explain it, and, if so, the statement of the testatrix's fortune was applicable to the purpose of such an explanation. Fonereau v. Pointz, 1 Bro. Ch. Rep. 472.]

{Where there is no connection by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view.

9 East, 267, Right v. Compton.

The effect of a positive bequest is not to be controlled by inference and argument from other parts of the will.

8 Ves. J. 42, Jones v. Colbeck.}

‖ In the construction of wills free from ambiguity, the general rule is, that evidence of the value of the estate devised, or of the amount of the testator's property, will not be admitted in order to raise an argument in favour of a particular construction. Whatever may be the amount, the general rule of construction must prevail.

Doe d. Handson v. Fyldes, Cowp. 833; Standen v. Standen, 2 Ves. jun. 593; 3Breckenridge v. Duncan, 2 A. K. Marsh. 51;ϑ Richardson v. Edmonds, 7 Term R. 640; Doe v. Dring, 2 Maule & S. 455; Bootle v. Blundell, 1 Meriv. 216; Jones v. Tucker, 2 Meriv. 537; Attorney-general v. Grote, 3 Meriv. 316; Smith v. Doe d. Jersey, 2 Bro. & B. 473; 5 Barn. & A. 387. β Parol evidence is inadmissible to explain, vary, or enlarge the words of a will, except in the case of a latent ambiguity, or to rebut a resulting trust. Mann v. Mann, on Appeal, 14 Johns. 1.ϑ

Where the subject of the devise is described by reference to some extrinsic fact, it is not only competent, but absolutely necessary, to admit extrinsic evidence for ascertaining that fact, and through that medium, to ascertain the subject of the devise. This is not done with a view to explain the will, or to add to its contents, but to ascertain what is included in the description used in the will.

Sandford v. Raikes, 1 Meriv. 646, 653. β Parol evidence of the intention of the testator cannot be admitted to vary the express terms of the will. Avery v. Chappel, 6 Conn. 270; Spalding v. Harrington, 1 Day, 8.ϑ

Where there is a devise of an estate purchased by A, or a farm in the occupation of B, it must be shown, by extrinsic evidence, what estate it was that A purchased, or what farm was in the occupation of B, before it can be shown what is devised.

Hulme v. Heygate, 1 Meriv. R. 285; 1 Meriv. 653; and see Lowe v. Lord Huntingtower, 4 Russell, 532, *notâ*.

So, in all cases where there is a latent ambiguity in a will, which is only raised by reference to extrinsic facts, other extrinsic evidence may be shown to do away and explain the ambiguity; as where a person had

two sons baptized John, and, conceiving that his elder son was dead, devised lands generally to his son, and the elder was in fact living, the younger may, in pleading or in evidence, allege the devise to him, and produce witnesses to prove his father's intent, and that he thought the elder was dead.

Cheyney's ca., 5 Rep. 68 b; and see Altham's case, 8 Rep. 155; Hob. 32; Jones v. Newman, 1 Black. R. 60; Harris v. Lincoln, 2 P. Wms. 136; Careless v. Careless, 1 Meriv. 384; Doe v. Westlake, 4 Barn. & A. 57.

And so, where a devise in a will is to a person designated by a Christian and surname, without any other description, and no such person appears to claim the legacy, or seems to have been known by the testator, parol evidence is admissible to show that both names are mistaken.

Beaumont v. Fell, 2 P. Wms. 140; Doe dem. Cook v. Danvers, 7 East, 303; and for other instances of latent ambiguities where parol evidence has been received, see Selwood v. Mildmay, 3 Ves. 306; Goodtitle v. Southern, 1 Maule & S. 299; Doe v. Jersey, 1 Barn. & A. 550; Whitbread v. May, 2 Bos. & Pul. 593; Doe v. Oxendon, 3 Taunt. 147; 4 Dow. 65, *contrà;* Thomas v. Thomas, 6 Term R. 671; Doe v. Jersey, 3 Barn. & Cres. 871; and Hewson v. Reed, 5 Madd. 451.

But where the will is upon the face of it ambiguous and uncertain, the only mode of arriving at its meaning is, by construing one part of it by another; and no external evidence of the declarations of the testator, or of other facts, is admissible; and if the ambiguity is incurable, the heir at law must take. As, for example, if the devise is to one of the sons of J S, who has several sons, such an uncertainty in the description of the devisee cannot be explained by parol proof.

3 East, 172; 2 Vern. 624; 8 Rep. 155 a; Baylis v. Attorney-General, 2 Atk. 239.

And so, a blank for the devisee's name cannot be supplied by parol proof.

But if the surname only is mentioned, and a blank left for the Christian name, parol evidence is admissible to show who the testator meant. The distinction between the two cases being, that in the former it is uncertain whether the testator had fixed on any object of his bounty; while, in the latter, it is clear he had some person in view; and to persons intimate with him, the imperfect description might sufficiently point him out.

Price v. Page, 4 Ves. 680; Abbott v. Massie, 3 Ves. 148; Andrews v. Dobson, 1 Cox Ca. 425. See Phill. on Evid. 1, 540, (7th edit.) and *antè* tit. *Evidence*, (G). As to particular rules of construction, and the force of particular expressions, and the creation of particular estates by will, see tit. *Legacies and Devises.*‖

β In the construction of a will, one name may be substituted for another, when it is manifest that not only the name used was not intended, but that a certain other name was necessarily meant.

Connolly v. Pardon, 1 Paige, 291; Dent v. Pepys, 6 Mad. 350.g

One part of a will shall be expounded by another: as where a man leaves an estate to another and his heirs, and afterwards mentions to have given him an estate-tail; heirs shall be taken to mean heirs of the body, and the devisee shall take only an estate-tail.

2 Freem. 267, Bamfield v. Popham. β See Covenhoven v. Shuler, 2 Paige, 122; Adie v. Cornwell, 3 Monr. 279.g

‖ Effect ought to be given to the whole will, if possible, and the intention should be collected from all the parts thereof to avoid repugnancy,

(G) How Wills shall be construed, &c. (*Extrinsic Evidence.*)

and a codicil is to be considered as part of it. Such, indeed, is the respect paid to intention, that a construction may be made to support it, when plain, upon the whole will, even against strict grammatical rules. But an express disposition cannot be controlled by inference.

Leon. 229; 2 Bulst. 178; Gittins v. Steele, Swanst. 28; Gray v. Minnethorpe, 3 Ves. jun. 105; 11 Ves. 148; 1 Ves. jun. 269.

Words of desire are of imperative obligation if the subject and object be certain, unless there is plainly an option or discretion intended to be given. If a testator uses technical phrases, he must be supposed to understand them, unless by other parts of the will he manifests the contrary. *Primâ facie* words must be understood in their legal sense, unless a contrary intent plainly appears.

Roberts on Wills, 1, 355, and cases there cited; Morris v. Bishop of Durham, 10 Ves. 522; Phillips v. Garth, 3 Bro. C. C. 60; Holloway v. Holloway, 5 Ves. 401; Winslow v. Tighe, 2 Ball & B. 204; β Brunson v. Hunter's Adm'r, 2 Hill's Ch. 490. g

The same words in different parts of a will should be construed in the same sense, unless the general intention call strongly for a different construction: and sometimes they may have a different force as applied to different subjects.

2 Chan. Ca. 169; 2 Ves. 616; β Elliot v. Carter, 12 Pick. 436. g

General words will be controlled to render the whole will consistent: but every word ought to have effect, if possible, so as it consist with the general intention.

Strong v. Teat, 2 Burr. 912; Doe v. Reade, 8 Term R. 118; and see 6 Ves. 129; 9 Ves. 205; 8 Ves. 295.

β Specific words have a technical effect derived from usage and sanctioned by decisions.

Hawley v. Northampton, 8 Mass. 3; Ide v. Ide, 5 Mass. 500; Needham v. Ide, 5 Pick. 510. But the technical force of words will be counteracted by rational implication. Vauchamp v. Bell, 6 Madd. 643.

But when the will is evidently drawn by an unskilful man, the terms used shall receive their popular, not their technical meaning.

Harper v. Wilson, 2 A. K. Marsh. 466.

When a word or expression has no intelligent meaning or an absurd one, or it is clearly repugnant to the clear intent of the will, it may be rejected.

Bartlett v. King, 12 Mass. 537; 5 Pick. 510.

The testator is presumed to have used words in their ordinary sense, unless it appears from the context that he used them in some other sense; or unless by a reference to extrinsic circumstances, the use of the words in their ordinary sense would render the provision of the will insensible or inoperative.

Mowatt v. Carow, 7 Paige, 187. g

If words admit of a twofold construction, the rule is to adopt that which may tend to make good the instrument, and to effectuate rather than to frustrate: and if words are rejected or supplied by construction, it must always be in support of the intent.

Per Lord Mansfield, 3 Burr. 1634.

"And" must be read as "or," where such reading is necessary in or-

der to a reasonable construction of the will, or where it is necessary in order to give effect to all the words.

1 P. Wms. 434; 2 Atk. 643; 1 Swanst. R. 330; 6 Ves. jun. 311; 7 Ves. jun. 459.

So "or" is sometimes to be read as a copulative, and shall not, where it comes at the end of a period, disjoin the preceding sentences if the intent be against it.

3 Atk. 390; 1 Wils. 140; 9 East, 366; 6 Ves. jun. 341; 12 Ves. 112; β Reg v. Enslin, 2 Mass. 554; Carpenter v. Heard, 14 Pick. 449; Navison v. Taylor, 3 Halst. 43; Den v. Migway, 3 Green, 330; Bouv. L. D. *Disjunctive Term;* 2 Rop. Leg. 290; 1 P. Wms. 433; 2 Cox, 213; 2 P. Wms. 383; 1 Bing. 500; 1 Yeates, 41, 319; 1 S. & R. 141; 1 Wend. 396; 6 Toull. n. 703 and 704; O'Brien v. Heeney, 2 Edw. 242; Mills v. Dyer, 5 Simm. 435.ℊ

The intention of the testator is not to fail because it cannot take effect to the full extent, but it is to work as far as it can.

3 P. Wms. 259.

Neither the want of merit in the object, nor the want of prudence in the disposition, nor any disproportion in the amount of the property given, will afford a ground for controlling or not giving effect to a will.

Thellusson v. Woodford, 4 Ves. 312, *et seq.*‖

βWhen a testator has a fee in a house, and devises it to another simply, it passes a fee in such house.

Holmes v. Williams, 1 Root, 332.

When there is a doubt, vested rather than contingent remainders are favoured.

Olney v. Hulls, 21 Pick. 311; Dingley v. Dingley, 5 Mass. 535; Shattuck v. Stedman, 2 Pick. 468; Bowers v. Porter, 4 Pick. 198.

Implied legacies are not to be supported, unless the intent is clear.

Grout v. Hopgood, 13 Pick. 159; Hart v. Executors of Hart, 2 Desaus. 57; Rathbone v. Dyckman, 3 Paige, 9.

General legacies are more favoured than specific ones.

22 Pick. 299; Briggs v. Hosford, 22 Pick. 288.

The heir at law is not to be disinherited, unless such be clearly the intention of the testator.

Heyden v. Stoughton, 5 Pick. 528.

In the construction of a will, the general rule is to consider the will, as to lands, to speak at the time of its date; and as to personal estate at the time of testator's death.

Smith v. Edrington, 8 Cranch, 66; Allen v. Harrison, 3 Call, 289.

The words in a will may be transposed in order to make a limitation sensible, or to effectuate the general intent of the testator.

Covenhoven v. Shuler, 2 Paige, 122.

The strict grammatical sense of words in a will may be rejected to carry into effect the intent of the testator.

Rathbone v. Dyckman, 3 Paige, 9.

"Her" was construed into "their," to give effect to the intent of the testator.

Keith v. Perry, 1 Desaus. 353.ℊ

(H) How Wills may be avoided.

WILLS may be avoided either by act of the party himself, as by *revocation;* or by legal sentence after the death of the testator, as for *fraud, &c.* Therefore we will consider,

(H) How Wills may be avoided. (*Revocation by cancelling, &c.*)

1. *What shall be deemed a Revocation of a Will:* ‖*And herein,*

1. Of Revocations by cancelling, alterations, and subsequent testamentary Acts.‖

By the 29 Car. 2, c. 3, it is enacted, "That no devise in writing of lands, tenements, or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent, but shall continue, &c., unless altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence (*a*) of three or more credible witnesses declaring the same." And by the same act, "no will in writing concerning personal estates shall be repealed, nor any clause or bequest therein altered by words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and read to and allowed by him, and proved to be done by three witnesses."(*b*)

‖(*a*) Notwithstanding these words, this clause is construed conformably with the fifth section as to the execution of the original will; and it is not held necessary that the testator should sign, provided he acknowledges the will, in the presence of the witnesses. See Roberts on Wills, vol. 2, p. 1; Dougl. R. 244, *notis;* Ellis v. Smith, 1 Ves. jun. 11. (*b*) See 2 Roberts on Wills, 105; 4 Ves. jun. 196, note, (*a*).‖

β Where the testator wrote below his will, "It is my intention, at some future time, to alter the tenor of the above will, or, rather, to make another will; therefore be it known if I should die before another will is made, I desire that the foregoing be considered as revoked, and of no effect," is a present revocation.

Brown v. Thorndike, 15 Pick. 388.*g*

‖Sir S S duly made his will on 2d March, 1810, occupying fifteen sheets of paper. The will was prepared from heads or instructions left with Sir S S for his approbation, after which it was returned to his solicitor to prepare the will, but signed in pencil by the testator, that it might operate in case of accidents in the mean time. It contained, amongst other bequests, one of 2000*l.* to the younger children of F S, Esq., Sir S's brother; but this legacy being struck through in the instructions was omitted in the formal will, in consequence of Sir S's expectation, explained to the solicitor, that the family of Lord C would provide for the younger children of F S. The will when executed was delivered to the solicitor, while the testator retained the instructions for reference. Sir S died 11th July, 1811, and a probate of the will only was obtained. The instructions were found in his secretary, and contained an obliteration of a legacy to Mr. G, the deceased's steward, with a mark in the margin to refer to it, and this endorsement on the outside: "If any legacy includes Mr. G in this or any other will or codicil, I revoke it.—S S, February, 1811." The pencilled obliteration of the legacy of 2000*l.* to F S's children was crossed through, and the deceased had, on the 29th March, 1811, signed every sheet of the will except the second, containing the obliteration of Mr. G's legacy. On a suit to compel the executors to prove this paper of instructions it was proved that the testator, after the execution of the will, had reason to believe that the C family would not provide for the children as expected, and that he said to persons in his confidence he supposed he must provide for the children, and expressed an intention of altering his will. Sir John Nicholl said that the presumptions were strong against the paper, as it had

been superseded by a more formal instrument: that the alterations were equivocal—they might be intended to be operative, they might be deliberative only: it was mere conjecture; and the court could not pronounce for the alterations where the intention with which they were made was not proved to the extent required by the rules of decision.

Sitwell v. Parker, Pre. Court Doc. C., 2 Roberts on Wills, 107; and see Dickenson v. Dickenson, 2 Phil. R. 173, where the pencil alterations were admitted; and see Mence v. Mence, 18 Ves. 348.‖

But, where a man, by will in writing, devised the residue of his personal estate to his wife, and after, she dying, he, by a nuncupative codicil, bequeathed to J S all that he had given to his wife, it was resolved good; for, by the death of the wife, the devise of the residue was totally void; and the codicil was no alteration of the former will, but a new will for the residue.

2 Raym. 34.

Revocations by the act of the party are either express, as where the devisor expressly declares his mind, that his will should be revoked; or implied, as where the estate or thing devised is altered after making of the will.

2 Abr. Eq. Cas. 769, Sir Richard Templeman's case, Mich. 4 Anne, in C. B. N. B. Where the spiritual court set aside a will as revoked by the testator, their sentence extends only to the personal estate, and does not revoke a devise of the real estate. 3 P. Wms. 166, Sir Samuel Marwood v. Turner. β When a second will contains an express clause of revocation, the preceding will is revoked, though it may not be formally cancelled. Boudinot v. Bradford, 2 Dall. 268.ℊ

If the latter part of a will is inconsistent with the former part of it, it supersedes and revokes it. *Per* Reynolds, C. B., and Comyns and Thompson, Barons, *in Scacc.*

Fitzgibbons, 195, Attorney-General v. Governor and Company of Chelsea Waterworks.

β When two wills are existing at the same time, and the testator destroys the second will, without doing any other act, the preceding will is, in general, *ipso facto*, revived.

Boudinot v. Bradford, 2 Dall. 268; Lawson v. Morrison, 2 Dall. 289; Havard v. Davis, 2 Binn. 406.

Where a testator having made a will, afterwards made another will containing a clause expressly revoking the former will; and afterwards destroyed the second will, and died leaving the first uncancelled; held, that such clause, *proprio vigore*, operated instantaneously to effect a revocation.

James v. Marvin, 3 Conn. 576.

A resident of the island of Jamaica made his will there, sufficient to pass lands in Ohio; afterwards he removed to Ohio, where he made a nuncupative will. Held, that such nuncupative will did not revoke, in whole or in part, the will made in Jamaica.

M'Cune's Devisees v. House, 8 Ohio, 144.ℊ

It was agreed to be the constant rule of this court, that where a legacy was given to a child, who afterward, upon marriage or otherwise, had the like or greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said, the words of ratifying and confirming do not alter the case, though

they amount to a new publication, being only words of form, and declaring nothing of the testator's intent in this matter.

2 Freem. R. 224, Irod v. Hurst. [For cases on this point, see tit. *Legacies*, (D).] ‖ See Monck v. Monck, 1 Ball & B. 298, Drinkwater v. Falconer, 3 Ves. J. 623; and see *antè* as to *Publication and Republication*.‖

Thus, defendant's testator by his will gave his four daughters 600*l.* apiece, and afterward married his eldest daughter to the plaintiff, and gave her 700*l.* portion; after that he makes a codicil, and gives 100*l.* apiece to his unmarried daughters, and thereby ratifies and confirms his will, and dies. Plaintiff preferred his bill for the legacy of 600*l.* given to his wife by the said will. And his honour held, that the portion given by the testator in his lifetime should be intended in satisfaction of the legacy.

2 Freem. R. 224, Irod v. Hurst. ‖ See tit. *Legacies*, Vol. vi.‖

J S had four daughters, A, B, C, and D, and by his will devised to A 1000*l.*, and by the same will devised to them 1500*l.* apiece for their portions; which last sums of 1500*l.* were to be raised out of a real estate devised by his will for that purpose. A marries in J S's lifetime; and J S gave her 4000*l.* portion. And *per* Lord K. Wright, this 4000*l.* portion must be taken to be a satisfaction of the 1500*l.* given A by the will for her portion; and a revocation of the will *pro tanto:* but as to the 1000*l.*, that being a general legacy, A must have it, notwithstanding the 4000*l.*, given her for her portion.

Prec. in Chan. 183, Ward v. Lant.

J S devised lands in S to A, his son, for ninety-nine years, determinable upon three lives, and by his will charges the said lands with an annuity of 50*l.* *per annum* to his daughter M, and afterward devises the same lands for ninety-nine years, determinable upon three other lives, reserving 50*l.* a year rent; this is, during the continuance of the lease, a revocation; but it is no revocation as to the 40*l.* *per annum* annuity, there being rent enough reserved to satisfy that.

Vin. Abr. tit. *Devise*, (R. 2,) pl. 16, Parker v. Lamb.

J S by will (*inter alia*) devises to B, his younger son, 750*l.*, and afterwards buys him a cornet of horse's commission, and paid 650*l.* for it, and it was proved he intended this 650*l.* should be discounted out of his legacy, and that he would strike so much out of the will, as soon as the accounts came to London to him, but died before they came, without altering his will. Decreed that the money paid for his commission shall go in diminution of the legacy, and be taken in payment and satisfaction for so much.

Prec. in Chan. 263, Hoskins v. Hoskins.

A by will gave his children several legacies, and to his eldest son 2000*l.* Afterwards he gave him 400*l.* to go to Italy; and being a merchant, enters on the debtor side of his book, *My son debtor* 400*l.* Then by a codicil, having taken an account of the estate, and finding it would not answer all the legacies, he retrenches 400*l.* out of each of the younger children's legacies, without taking any notice of the eldest son, or his 400*l.* His honour decreed the whole 2000*l.* to the eldest son.

Prec. in Chan. 298, Bird v. Hooper. His honour mentioned the case of Lord Guernsey, who married a daughter of Sir John Banks, with whom he had a considerable fortune in land. Afterwards Sir John builds a house upon the land, and being a merchant makes an entry, Lord Guernsey debtor so much, for building the house;

and then makes his will, and devises the residue of his estate to his two daughters; and yet it was held, that this house should fall into the lump of the fortune given to Lady Guernsey. Ibid.

β A testator seised of two tracts of land, and possessed of some personal estate, devised one tract to his son, and the other to the family of his daughter, and gave to a bastard child of his daughter a legacy of 400*l.* After he had so made his will, the testator sold the land he had devised to his daughter's family, and incurred debts on judgments under which his other tract was sold, leaving at his death not more than enough to pay the legacy of 400*l.* Held, that these circumstances did not amount to a revocation of the will.

Wogan v. Small, 11 S. & R. 141.*g*

A man makes his will duly executed and attested according to the statute of frauds and perjuries, and at the same time, in like manner, executes a duplicate thereof. Some time after, the testator, having a mind to change one of his trustees, orders his will to be written over again, without any variation whatsoever from the first, save only in the name of that trustee; and when it was so written over, he executes it in the presence of three witnesses, and the three witnesses subscribed their names, but not in his presence: after this the testator cancels the duplicate, by tearing off the seal, and then dies. And the question was, Whether this second will, not being good as a will to pass lands, should yet be a revocation of the first; and if it should not, whether the cancelling the other should be a revocation thereof within the statute of frauds and perjuries? And it was decreed, that neither the making of the second nor the cancelling of the first was a revocation thereof; though in the second there was an express clause, that he did thereby revoke all former and other wills. Wherein my Lord Chancellor took this distinction, that the second was not intended barely a revocation of the first, so as to signify his intention of dying intestate, or without any will; but it was intended as an effectual will to pass the lands to the persons, and in the manner thereby devised: and therefore if it was not good as a will to that purpose, it was no revocation of the first, but as it was supposed to be valid as a will for passing the lands by the second; and if a man by his will devises lands to A, and after makes a second will, and thereby devises the same lands to B, if this second will be not good as a will to pass the lands to B, it shall be no revocation of the devise in the first to A; for it is plain A was to lose only what B was to gain; and if B gains nothing by the second, A shall lose nothing that was given him by the first. But, if a man executes a second will, which appears to have no other intention than to revoke the first, and to die intestate, though this second be not in all circumstances duly executed as a will whereby to pass lands, yet it will operate as a revocation of the first. And as to the cancelling or tearing of the first will, that is no revocation of it in this case, because that was no self-subsisting independent act, but done to accompany, or in way of affirmation of the second; it was done from an opinion, that the second had effectually revoked the first, and therefore he tears the first as of no use; but the first was not effectually revoked by the second; and the act of tearing the first will not destroy it neither; for though a man may, by the statute of frauds, as effectually destroy his will, by tearing or cancelling it, as by making a second; yet if he does make a second, and intends that as a revocation of the first, if it be insufficient for that purpose, as in the principal case, the tearing or cancelling being only in consequence

of his opinion, that he made a good second will, it shall not destroy the first; but it ought to be set up again in equity.

1 Abr. Eq. Cas. 407. β *Qu.* Whether a will devising real estate, attested by three witnesses, can be revoked, by a subsequent will attested by two witnesses only? Belden v. Carter, 4 Day, 66. But see Witter v. Mott, 2 Conn. 67.ℊ

But if a man cancels or revokes either the duplicate or original will, there is an effectual avoiding of both, they being both but one will, and therefore must stand or fall together.

2 Vern. 742, Onions v. Tyrer; ‖1 P. Wms. 345; Prec. in Chan. 459;‖ β Betts v. Jackson, 6 Wend. 173.ℊ

β Testator having made a will devising real estate, duly attested, afterwards wrote on the back of it, and subscribed the following words: "This will is invalid, March 9th, 1813, as L S has agreed that my wife shall claim no right of dower, and bound himself accordingly." Held, that this declaration was an express revocation of the will.

Witter v. Mott, 2 Conn. 67.ℊ

[A testator, (who had for two months together frequently declared himself discontented with his will,) being one day in bed near the fire, ordered M W, who attended him, to fetch his will, which she did, and delivered it to him, it being then whole, only somewhat erased. He opened it, looked at it, then gave it something of a rip with his hands, and so tore it as almost to tear a bit off, then rumpled it together, and threw it on the fire, but it fell off. It must soon have been burnt, had not M W taken it up, which she did, and put it in her pocket. The testator did not see her take it up, but seemed to have some suspicion of it, as he asked her what she was at, to which she made little or no answer. The testator at several times afterwards said, that was not and should not be his will, and bid her destroy it. She said at first "So I will, when you have made another;" but afterwards, upon his repeated inquiries, she told him that she had destroyed it, though in fact it was never destroyed; that she believed he imagined it was destroyed. She asked him who his estate would go to when the will was burnt? he answered, to his sister and her children. He afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother J M, and desired the person to tell his brother so, and that he wanted to see him. He afterwards wrote to his brother, saying, "I have destroyed my will which I made; for upon serious consideration, I was not easy in my mind about that will;" and desired him to come down, saying, "If I die intestate, it will cause uneasiness." The testator, however, died without making another will. The jury, with the concurrence of the judge, thought this a sufficient revocation of the will; and so it was held to be by Lord Chief Justice De Grey and the whole court, on a motion for a new trial, and the rule discharged: the Chief Justice observing, that this case fell within two of the specific acts described by the statute of frauds; it was both a burning and a tearing: and that throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute.

Bibb v. Thomas, 2 Black. R. 1043.] β As to what will amount to a cancellation, see Betts v. Jackson, 6 Wend. 173; Jackson v. Betts, 9 Wend. 208; Idley v. Brown, 11 Wend. 227; Dan v. Brown, 4 Cowen, 483; Jackson v. Halloway, 7 Johns. 394; Avery v. Pixley, 4 Mass. 460.ℊ

β When a testator intends to revoke a will, sends for it, and the devisee

prevents him, the will is not thereby revoked, but the devisee holds as trustee for the heirs.

Gains v. Gains, 2 Marsh. 190.

Directing a will to be burned by the person who has possession of it, and who refuses to do so, is not a revocation.

Giles's Heirs v. Gills's Executors, Conf. Rep. 174.

The destruction of a will, even by the testator himself, does not amount to a revocation, if the testator had not capacity. Though the instrument is not in being, if its contents are known, it can be proved.

Idley v. Bowen, 11 Wend. 227; Jackson v. Halloway, 7 Johns. 394.

A man makes his will in writing, and thereby devises all his real and personal estate to his wife, her heirs and executors, in trust to pay his debts and legacies; and then devises several legacies to his children, and other persons, and concludes, "In witness whereof I have to this my last will and testament, containing nine sheets of paper, and to a duplicate thereof, to be left in the hands of such a one, set my seal to every sheet thereof, and to the last of the said sheets my hand and seal, in the presence of three witnesses, who all subscribed their names in due form of law." Afterwards the testator being minded to add other trustees to his wife, and make some alterations in his will, sends for a scrivener, and gave directions to prepare a draught of instructions for another will, which the scrivener does accordingly, and the testator read it over and approved of it very well, and sets his hand to it; and being at a tavern, thinking that he had now made a new will, he pulls out of his pocket the first will and tears off the seals from the first eight sheets, which the scrivener seeing, asked him what he was a-doing? "Why," says he, "I am cancelling my first will." "Pray," says the scrivener, "hold your hand, the other will is not perfected; it will not pass your real estate for want of being executed pursuant to the statute of frauds and perjuries." "I am sorry for that," says he, and immediately desisted from tearing off any more of the seals; and in some short time after dies, without having done any thing further to perfect the second will or cancel the first. After his death, on application to the spiritual court by the wife, who was made executrix of his last will, they sentenced it a good will as to the personal estate, and admitted her to prove it: and on a bill brought by the legatees against the wife, and other trustees, to have a specific performance of the trust in the first will, and that the estate might be sold, pursuant to the directions of that will; it was insisted upon, that the first will was revoked either by making the second, or by tearing off the seals from the first; but Lord Chancellor held, that the subsequent will could be no revocation as to the real estate, not being executed according to the statute of frauds and perjuries; and that as to the tearing off the seals from the first eight sheets, that not being done *animo cancellandi*, was no revocation; and that the seal remaining whole to the last sheet was sufficient, and in strictness it was not necessary that all the sheets should be sealed: but because the spiritual court had sentenced the second a good will of the personal estate, his lordship held it a good will for the whole personal estate, and that such legatees of personalties in the first will, as are left out in the second, must lose their legacies; but for those that had legacies by the first will chargeable on the real estate, if the same legacies were devised to them by the second will, that they should still continue chargeable on the real estate; provided such legacies

were not increased or enlarged by the second will: for though the second will was not sufficient in itself to charge the real estate, yet since the real estate remained well devised by the first will, they should be still secured by that real estate; for they were not devised out of land like a rent, but only secured by land, which before was well devised; but for new absolute personal legacies devised by the last will, they should be chargeable only upon the personal estate, and should have the preference to be first paid out of the personal estate before the other legacies in the first will, charged upon the real estate, because they had several funds, out of which they were to be paid; the personal legacies in the last will out of the personal estate, which was well devised by that will; and the legacies charged upon, or secured upon the real estate, which was devised, by the first will, out of the real estate.

1 Abr. Eq. Cas. 409; Hyde v. Hyde, 3 Chan. R. 155, S. C., and decreed and adds, that all agreed that the second will, though not sealed and subscribed as the statute of frauds directs; yet it is good for the personal estate, it being *casus omissus* out of the statute, and then it was good at common law. Ibid. 161.

βA cancellation is *primâ facie* evidence of a revocation, but if made with intent of executing a new will, and that intent fails, the cancellation is conditional and shall have no effect.

Bethell v. Moore, 2 Dev. & Bat. 311.β

‖ So also where the testator, being angry with one of the devisees named in his will, began to tear it with the intention of destroying it, and, having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a bystander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm, and having put by the several pieces, he expressed his satisfaction that no material part of the will had been injured, and that it was no worse. The learned judge left it to the jury to say whether he had completely finished what he intended for the destruction of the will, and the jury having found that he had not, the court considered that they had drawn the right conclusion from the facts, and supported the will.

Doe dem. Perkes v. Perkes, 3 Barn. & Ald. 489.‖ βSee Burns v. Burns, 4 S. & R. 297; Boudinot v. Bradford, 2 Dall. 266; Lawson v. Morrison, 2 Dall. 267, note.β

[On a special verdict in ejectment, the jury found, that A, seised in fee of the lands in question, made his will, and thereby devised them in manner therein stated, and after making that testament, viz., &c., he made *aliud testamentum in scriptis*, but what were the contents thereof, or its purport, or effect, they did not know. The question was, Whether the latter will, so found, was a revocation in law of the devise of the lands in the former? And the court declared their opinion, that they were not satisfied the second will did revoke the former; because it was not found that any lands were devised by the second will, so that it might or might not be consistent with the former; and when the matter stood indifferent, the court would not suppose a revocation of a will solemnly made. And this judgment was affirmed on appeal to the House of Lords.

Seymour et al. v. Nosworthy *in Scac.*; Hard. 374, S. C.; Show. Parl. Ca. 146, S. C. by the name of Hitchins v. Basset, *in Banco Regis*, 3 Mod. R. 203; Comb. 90; 2 Salk. 592; 1 Show. 537.

On a special verdict in ejectment, the jury found, that L, seised in fee of *chambers*, and having a considerable personal property, in 1748, by will, *duly attested to pass real property*, gave and devised all his real and

personal estate, of what nature or kind soever, or wheresoever, unto his dear friend H: that, afterwards, in the year 1766, L made and published *another* will and testament in writing, *in the presence of three subscribing witnesses, who duly attested the same;* that the disposition made by L in the will of 1756 was different from the disposition in the will of the year 1748, *but in what particulars was unknown to the jurors; but they did not find that the testator cancelled his will of the year* 1756, *or that the defendant destroyed the same; but what was become of the said will, the jurors said they were altogether ignorant.* The question was, Whether the latter will, being expressly found by the jury to be *different* from the former, was a revocation of it? Those who argued, that the last will, thus found, revoked the first, attempted to distinguish this case from that of Hitchins and Basset, upon the grounds that, in this case, the jury were so far from being totally ignorant of the contents of the second will, that they were enabled to find, and did find, that the disposition in 1756 was *different from* that in 1748; and they contended, that the fact that it concerned lands was sufficiently found by the mode of devising, and that it extended to the estate in question, was inferred from the testator's having *no other estate* which required the solemnities of the statute of frauds. But, on the other side, it was contended, that, before a latter will could be determined to revoke a former, it must be shown to contain an inconsistent disposition, or circumstances must be made out from whence that might be presumed, as spoliation, or the like; but here the jury expressly found, that they did not know in what the difference consisted, though they found it different; that nothing could be presumed upon a special verdict; nothing specifically appeared touching the will in 1756; and the arguments for its being a revocation were fallacious; for it did not appear what were the contents thereof, *et de non apparentibus et non existentibus eadem est ratio:* that presumptions were always in the affirmative, there could not be any negative presumption; that no presumption could arise from a diversity, unless that diversity were shown and found; that therefore a second *will* in the dark, which neither the jury nor the court ever saw, and were *wholly ignorant* of the contents of, ought not to be set up; for, if it were, an heir might avail himself, by destroying the second will, to defeat both wills. And upon these grounds it was adjudged, in the Court of King's Bench, on a writ of error from the Court of Common Pleas, that the latter will, so found, was not a revocation, and the judgment below reversed; and that reversal was afterwards affirmed in the House of Lords.

Goodright v. Harwood, 3 Wills. 497; 2 Black. R. 937; Cowp. 87; 7 Bro. P. C. 344.

||And where the testator devised his personal estate to A, and his real estate to B, and A died, and the testator afterwards acquired other real property by devise and purchase, and then made a second will, disposing by name of his after-acquired testamentary property to C, and then added, "As to the rest of my real and personal estate, I intend to dispose of it by a codicil thereafter to be made to this my will,"—it was held that this was no revocation of the first will: for even supposing the future disposition to be intended to be inconsistent, (which did not appear,) a mere intention to revoke did not amount to a revocation.

Thomas v. Evans, 2 East, 488.

The revocation by a codicil must either be by express words, or by inconsistency of devise. Where a testator devised estates for life without

impeachment of waste, and then by a codicil directed the trustees to let until the tenant for life married; the leases to be under certain restrictions, one of which was that they should not be unimpeachable of waste, the codicil was held not inconsistent, and therefore no revocation.

Lushington v. Boldero, Coop. C. R. 216; and see Hicks v. Hearle, 1 Younge & J. 470; Duffield v. Elwes, 3 Barn. & C. 705.

Where a will and codicil gave a power to sell to certain persons at a fixed price, and a subsequent codicil devised the premises to trustees to be sold for payment of debts, and subject thereto on the trusts of the will, the codicil was held a revocation.

Bridger v. Rice, 1 Jac. & Walk. 74.

Where an alteration was made in a will by a codicil, and also by an interlineation, and the testator cancelled the codicil, it was held that this set up the will in its original state, although the interlineation in the will was left standing.

Utterson v. Utterson, 3 Ves. & Bea. 122.

Where the testator bequeathed as follows: "As to all that my leasehold house in L, and all my household goods and furniture there, and at S, and as to all my plate, linen, china, pictures, live and dead stock, and all the residue of my goods, chattels, and personal estate, I give and bequeath the same to A," and by a codicil he revoked the bequest "of the residue," and gave "the residue of his said personal estate" to B; it was held, that the gift of the general residue only, and not of the articles enumerated, was revoked.

Clarke v. Butler, 1 Meriv. R. 304; and see Lord Carrington v. Payne, 5 Ves. 404; Holder v. Howel, 8 Ves. 97; Gallini v. Noble, 3 Meriv. 691; Hotham v. Sutton, 15 Ves. 319.

Where the codicil revoked legacies in the will on the supposition that the legatees were dead, on its being proved that they were living, it was held that the revocation did not take effect, and they were entitled to take.

Campbell v. French, 3 Ves. jun. 321. As to effect of a mistake on a testamentary disposition, see Rob. on Wills, 2, 41; and see the instance of such mistake or misrepresentation mentioned by Cicero de Oratore, lib. 1, c. 38: "Quæ potuit igitur esse causa major, quam illius militis? de cujus morte cum domum falsus ab exercitu nuntius venisset, et pater ejus, re creditâ, testamentum mutasset; et quem ei visum esset, fecisset hæredem, essetque ipse mortuus—res delata est ad centumviros cum miles domum revenisset egissetque lege in hæreditatem paternam."

{One devised his personal estate to A and his real estate to B. After A's death, the devisor, having acquired other real property, some by devise, and some by purchase, made a second will, disposing by name of his after-acquired *devised* estate to C, and then added, "As to the rest of my real and personal estate, I intend to dispose of it by a codicil hereafter to be made to this my will." This is no revocation of the first will, even if it be considered that he meant to include the property thereby devised; because it is a mere declaration of an intent to dispose of it in future; and *non constat* that such disposition would be inconsistent with the first will. But it does not appear that he meant to include the same property in the residuary clause; for he had other property, both real and personal, undisposed of by either of the instruments; namely, his personal property which had lapsed by the death of A, and his real pro-

perty purchased by him after the date of his first will, which alone he might have intended to dispose of by a future codicil.

2 East, 488, Thomas v. Evans. Before the statute of frauds, an *intention* to revoke in future expressed by parol, was no revocation. Cro. Ja. 497, Cranvel v. Sanders, Moor. 874, Case of the Co-heirs of Sir W. Rider.}

A testator made a will of his lands, and afterwards gave the same lands to the same person by a latter will, but omitted to cancel the former, and afterwards cancelled the latter, and both wills were in the testator's custody at the time of his death, the second cancelled, the first uncancelled. The question was, Whether, under these circumstances, the first will was to be considered as revoked, and the devisor consequently dead intestate. *Per curiam*,—A will is ambulatory till the death of the testator. If the testator let it stand till he die, it is his will; if he do not suffer it to do so, it is not his will. Here, though the testator made two wills, yet the second will never operated; for it was only intentional, and the testator changed his intention, and cancelled the second, so that it had no effect: it was as no will at all, being cancelled before his death; then the former, which was never cancelled, stood as his will; for none of the cases of revocations in law, by alteration of circumstances, applied to this sort of case; and it was clearly not a revocation within the meaning of the statute of frauds, none of the circumstances delineated in that statute existing in this case.(*a*)

Goodright v. Glazier, 4 Burr. 2512; and see Perk. fol. 210, § 479; 44 Ass. pl. 36, M. 44 E. 3, 33. ‖ But the Court of Delegates have held as to wills of *personalty*, that the mere act of cancelling the second will does not alone revive the first, without other circumstances. 1 Phill. R. 375, 406; and see 2 Rob. on Wills, 32.‖ {Parol evidence may be given to show whether the testator, by cancelling the second will, meant to revive the former instrument or to die intestate. The evidence does not go directly to destroy an existing will, but merely to prove that he did not intend to re-establish a will which he had once actually destroyed. 2 Dall. 266, Boudinot v. Bradford; Ibid. 286, Lawson v. Morrison.} (*a*) Vide § 6.

N, in 1759, duly executed his last will and testament, and also a duplicate thereof, but at the same time declared that it was not a will to his liking, and that he should alter it. Afterwards, in 1761, he made another will, which was also duly executed, the devises in which were different from those in the will of 1759, and at the end of it there was a declaration, by which he revoked all former wills. After executing the latter will, N took one part of the old will in his hands, tore off the name and seal, and directed the person who had made the new will to cut off the names of the witnesses to the old one, which he did in N's presence. N at the same time said, that a duplicate of the former will was in the hands of W, a devisee therein. He then delivered the new will to the person who made it, requesting him to take it away with him to his house, and keep it, for reasons which he mentioned. Afterwards a principal devisee in the last will died, soon after which the testator sent for the last will, and in 1762 had this will returned him. The testator, before his death, sent for an attorney to make a new will, but became senseless before he arrived. On his death, one part of the will of 1759, and also the will of 1761, were found together in a paper, both cancelled. The other part of the will of 1759 was found uncancelled in the testator's room among other deeds and papers; how it came there did not appear; but W, a devisee therein, was in the house when the searches were made. And the question was, Whether the testator died intestate, or not; that is, whether the will of 1759

was revoked? And it was held, that the will of 1759 was clearly revoked: first, by the new will of 1761, which was a complete, legal, and effectual will, and would have revoked the former, whether it had been cancelled or not; because at the end of it there was a declaration, by which he revoked all former wills: secondly, because the testator had actually cancelled the will of 1759.

Burtonshaw v. Gilbert, Coop. 49. ‖See Winsor v. Pratt, 2 Bro. & B. 656; Stride v. Cooper, 1 Phill. R. 334.‖

‖Where a testator cancels the part in his custody, the strong legal presumption is, that the duplicate in the possession of another person was not meant to prevail. If both are in the possession of the testator, the one cancelled and the other uncancelled, the presumption of revocation still holds, but it has less strength. If both are in the testator's possession, the one altered and cancelled, and the other *in statu quo prius*, the presumption against the operative existence of either may still remain, but with a strength yet more diminished.

Pemberton v. Pemberton, 18 Ves. 290.

Where a testator devised lands to two trustees, in trust for certain purposes by a will duly executed, and afterwards struck out the name of *one* of the trustees, leaving the general purposes of the trust unaltered, and did not republish his will: it was held that this did not operate as a general revocation, so as to let in the heir, since the testator's intent was only to revoke by substituting another good devise; and as this could not take effect for want of the requisites of the statute, it should not operate as a revocation; and at most, it could only be a revocation *pro tanto* as to the trustee, whose name was obliterated, leaving the devise good as to the old trustee, whose name was retained.

Short v. Smith, 4 East, 419. See Larkins v. Larkins, 3 Bos. & Pul. 16, 109, *acc.*; Grantley v. Garthwaite, 2 Russell, 90.‖

M, by his will, gave particular lands, and his personal estate to be laid out in lands, to charitable uses; and then by a codicil, reciting his will, and that he had devised his lands to such uses; "but that there had been an act of parliament, intituled, 'the mortmain act,' and being in doubt whether the devise made by him to such charitable uses would be good or not, and being still desirous, as far as in him lies, to confirm his said will, nevertheless if, by the act of parliament, or by any construction of law thereupon, the estate is not well devised, and cannot go to those uses, then and in such case he gave the lands to B and his heirs." Afterwards M made another codicil, reciting as before, and, "that *being advised the devise of his lands would be void*, and it being his intention the charity should be continued, *and being advised his personal estate could be given*, he did therefore, by this codicil, give his personal estate to the charitable uses before mentioned, and he did thereby give his real estate to B." Between the time of making the will and the codicils, the mortmain act passed; and the question was, Whether, upon the construction of all the instruments, the last codicil was a revocation of the first will? which turned upon the point, whether the last codicil, as to its revoking the will, was put singly upon the point of law, whether the devise was valid or not under the mort main act; or whether the testator, having been advised that his personal estate had been so much increased as to be sufficient to support the charity, (for the codicil was made a considerable time after the will,) taking the

whole into his consideration, viz., the point of law upon the statute, viz., that the devise of the real estate would be void, the fact that he might make a good disposition of his personal estate to the uses of the charity, and that it would be sufficient for the purpose, meant an actual revocation of the will as to the real estate in all events. And on a case sent from the Court of Chancery to the Court of King's Bench, they certified that the real estates were well devised to B by the last codicil; the necessary conclusion from which is, that it was a revocation of the will.

Attorney-general v. Lloyd et al., 3 Atk. 552; S. C., 1 Ves. 32.

One made his will, devising the bulk of his real estate to three trustees on certain trusts, and some particular lands to charitable uses. He then made a codicil, which he published and declared should be annexed to and be taken as part of his will; and making some alterations thereby in the disposition of the trust of the bulk of his estate, *after reciting the devise to the charity*, he devised the same lands, together with another piece of land, to the same three trustees and two others, and their heirs, upon the same special trusts and confidences as in the will, and concluded with confirming *all other parts* of his former will. Upon these instruments it became a question, Whether this trust for the charity could take effect? The doubt arose from the circumstance of the mortmain act having passed in the time that intervened between the making of the two instruments. If the codicil revoked the will as to the charity, it was clear that it could not take effect; because the devise to it in the codicil, that being made after the act passed, was void. It was therefore contended by those who opposed the devise to the charity, that by the codicil, the devise both as to the legal estate and trust was revoked; for the whole fee, at law, was certainly altered, by the devise, to five trustees instead of two. It passed to different persons in different manners; the trustees must claim under the codicil: an ejectment must have been brought in their five names; they must have joined in any conveyance: the adding more land also showed an intent to make a new regulation. But Lord Hardwicke was of opinion, that the beneficial interests and profits to the charity were not revoked but confirmed by the codicil; and one ground of his lordship's opinion was, from the nature of the instrument which effected a devise only in the degree expressed; and therefore, though the codicil effected a new devise of the legal estate by giving it to the same trustees and two others, and an alteration of the trust estate by a variation of the devise of the surplus profits, it left the trust for the charity exactly the same as under the will.

Willet v. Sanford, 1 Ves. 178, 186.

S being seised in fee of a house at Bath, and of other freehold estates of the yearly value of 300*l.*, and of other estates of the value of 500*l.* a year in remainder after the death of his father, made his will, and thereby gave all his lands in possession, reversion, or remainder, *except the house at Bath, upon trust to sell* and dispose of the said lands; and to place the money arising therefrom upon real security, and out of the interest and produce thereof, to pay his wife *four hundred pounds* a year, in lieu of so much a year which she would be entitled to by their marriage settlement. And he gave to his wife, *in satisfaction of the remaining* 500*l.* which she could claim by the settlement, *his house in Bath* for her *life*, and, after her death, devised it to his eldest son. After reciting his wife's being *enseint*, he gave to such child, whether son or daughter, 3000*l.* to be paid out of

(H) How Wills may be avoided. (*Revocation by Codicil.*)

the moneys arising by the *sale* of the lands, and to be paid at his or her age of twenty-one. He did further by his will direct, that, when the estates directed by him to be sold were actually sold, and the moneys arising from them invested in the said securities, 100*l.* a year should be given to his wife for the bringing up of his daughter M *and any after-born child:* and if his said daughter, or *such after-born child*, should happen to die before his or her legacy should become due, that then such legacy should sink into the *residuum* for the benefit of his son. After some pecuniary legacies he gave the rest, residue, and remainder of his estate, &c., to his son; but, in case he should die before twenty-one without issue, he then gave and bequeathed the same residuary estate *to the child with which hit wife was enseint, if a son, as his own for ever: but, in case such child should prove a daughter*, then he gave the same residuary estate between his two daughters as tenants in common. At the time of making his will the testator had *a son* and a *daughter*, and his wife was *enseint* with another child (a daughter) afterwards named J M. After the date of the will, the testator *sold his house at Bath*, and had two daughters born, J M and A S. After the sale of the house in Bath, and the birth of his two daughters, the testator, in his own hand, made the *following alterations* in his will; but the making thereof was not attested, nor the will republished.—In the devise to the trustees *the exception of the house at Bath was struck out.*—In declaring the trusts of that devise, so far as related to his wife's annuity, he *interlined* the word "*fifty*," so that the annuity was altered to 450*l.* *The bequest to his wife of the house in* BATH *was* STRUCK OUT, *and the remainder to his son.* The *recital of his wife's being enseint, and the legacy of* 3000*l. were* STRUCK OUT, and instead thereof, he inserted these words, "*I give to my two daughters*, J M and A S, 2000*l. each.*" In the direction for bringing up his daughters, he made the word "daughter" *daughters*, and instead of the words "*after-born child*," he inserted the names "*J M* and *A S.*" In the clause respecting the lapse of the legacies, the word "*daughter*" was made *plural*, the words "*after-born child*" were STRUCK OUT, and instead of "*his or her*" the word "*their*" was inserted. He also made alterations as to his pecuniary legacies. The *residuary devise* to the child *of which the wife was enseint* was likewise STRUCK OUT, and instead of the word "*two*" before "DAUGHTERS" he substituted the word "THREE." The question referred to the opinion of the court was, "Whether, by the will of the testator, as *altered, obliterated*, and *interlined* by him, any, and what part, of the real estate therein mentioned, passed thereby to any person, and to whom? Which depended upon whether the alterations and obliterations in the will amounted to a *total revocation of it* with respect *to the real estate.* And the court, (declining to give any opinion as to the legacies to the daughters, recommending the decision of that point to be deferred until the son, then an infant, should come of age,) as to the devise to the trustees to sell, were clearly of opinion it was not revoked but continued in force; and they certified accordingly.

Sutton v. Sutton, Cowp. 812.]

A, in December, 1715, makes his will, and signs, seals, and publishes it in the presence of four witnesses, who attest and subscribe the same in his presence, and thereby gives to H P, his son, and to his heirs and assigns for ever, his lands, &c. The 2d of January following, he orders one O to make an alteration in his will, and interlines these words: "I give unto my wife, A P, and her assigns, my lands in W for her life; and after her

decease to my son H and his heirs." The will is read to the testator, and he approves of it with the interlineation: he puts his seal upon the wax in the presence of three of the same witnesses, but does not write his name *de novo*, neither do the witnesses subscribe theirs *de novo*. The question was, Whether this was a good devise to A P for her life? This doubt was chiefly upon the 29 Car. 2, whether this alteration was not a revocation within the statute. Every bequest is to continue in force until the same be burnt, &c., by the testator or his direction, in his presence, or unless the same be altered by some other will or writing of the devisor, signed in the presence of three or four witnesses, declaring the same. If the will be signed, it may be in any part; and *per* Parker and Eyre,—The putting a seal is a good signing; for, *per* Parker, C. J., the intention of the parties signing it, and the witnesses attesting, is only that the witnesses may know it again. This act is fully penned, and is not to be expounded away. *Per* Powis,—Here is no danger of fraud or perjury: here is a new devise, and not an alteration only. *Per* Eyre,—Every thing is right, save the new subscribing by the witnesses; the case of Lea v. Libb in Shower, 68, 69, is right; nobody can say this new bequest was signed in the presence of the testator. *Per* Eyre and Parker,—There must be more than a bare revocation. It must be signed in the presence of three witnesses. The altering a will must be understood of a revoking, *i.e.* an alteration by revocation. The latter implies the whole will, the former of any part, otherwise this alteration will clash with the former clause; so that if the testator revokes the whole or part, it shall be by will or writing, signed in the presence of witnesses, but they are not obliged to subscribe. *Per* Eyre,—If H P had been here found heir at law, then A, the lessor of the plaintiff, might have been helped; for if this be an alteration, so as H is not to have the lands till after A's death, she will have an estate by operation and implication of law.

Vin. Abr. tit. *Devise*, (R), 4, pl. 3, Townshend v. Pearce.

[So, if a testator devises an absolute estate in fee to A, and afterwards, by a subsequent devise, gives him only an estate-tail in the same land; it is a revocation only to the extent of the difference between an estate-tail and an estate in fee.

Per Lord Mansfield, Cowp. 90.]

B, by will duly executed pursuant to the statute of frauds, and dated in October, 1738, gave and devised 800*l.* to his sister E, and also 400*l.* to his sister L, and other small pecuniary legacies, and then gave all his real and personal estate, not otherwise therein disposed of, after payment of his debts and legacies, to S, his brother, and appointed him executor. Afterwards B, by a subsequent will, dated May, 1741, and revoking all former wills, gave and bequeathed 100*l.* to his sister L, and 400*l.* to his sister E, and the rest and residue of his estate, real and personal, he disposed of as before. But the latter will was not executed according to the statute of frauds. Lord Hardwicke being of opinion, that these legacies being to be taken originally as personal, because although the latter words created a charge upon the land, yet they were in their primary intention personal; the next question was, Whether the legacies given by the first will were revoked by the second *in toto*, they being given differently and to different persons; or, whether the legacies given by the second will were to be considered as only modifications of the first, and, consequently, as revocations of them

pro tanto only; the consequence of which would be, that the latter legacies would continue a charge upon the land? And Lord Hardwicke was of opinion, that the legacies given by the second will were to be considered as part of the money given by the first, only new-modelled or qualified; and that the second will, therefore, was a revocation of the first *pro tanto* only; and, accordingly, decreed the raising of the less sums out of the real estate of the testator.

Brudenell v. Boughton, 2 Atk. 268. ‖ See 1 Ves. & B. 446; Rose v. Conynghame, 12 Ves. 29.‖

If A by his will devises all the residue of his personal estate to B and C, and makes them executors; and after, by a codicil, cancels and revokes every legacy, thing, and part relating to B, and revokes his being executor; C shall have the whole. A revocation, without a new gift, shall have the same effect as if it had been expressly given; and whether it be by codicil or obliteration, it is the same.

MS. Rep. Humphries v. Taylor, *in Canc.*, Hill. 25 G. 2. ‖ See 4 East, 419.‖

{So if a devise be to three persons as joint-tenants in fee, and the testator afterwards strike out the name of one of the devisees, and there be no republication, the erasure will operate only as a revocation of the will *pro tanto;* and the other devisees will take the whole. But if the other devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If, therefore, the devisees had been tenants in common, upon the erasure of one name, the remaining two would take no more than two-thirds of the estate.

3 Bos. & Pul. 16, 109, Larkins v. Larkins.

So where one devised lands to two trustees in trust for certain purposes, and afterwards struck out the name of one of those trustees and inserted the names of two others, leaving the general purposes of the trust unaltered, though varying in certain particulars, and did not republish his will: it was held that his intent appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the requisites in the statute of frauds, it should not operate as a revocation; or at most it could only operate as a revocation *pro tanto*, as to the trustee whose name was obliterated: leaving the devise good as to the old trustee whose name was retained: the insertion of the names of the new trustees being for want of a proper publication inoperative.

4 East, 419, Short v. Smith.}

‖ Where testator bequeathed as follows: "As to all that my leasehold house in L, and all my household goods and furniture there and at S, and as to all my plate, &c., and all the residue of my goods and personal estate, I give and bequeath the same to A;" and by a codicil he revoked the bequest of the *residue* to A, and gave "the residue of his said personal estate to B;" the gift of the general residue only, and not of the articles enumerated, was revoked by this codicil.

Clarke v. Butler, 1 Meriv. 304.‖

A subsequent devise to a person incapable of taking, is a revocation of a precedent devise to a person capable. This was approved by the counsel on both sides as good law.

10 Mod. 233, Roper v. Radcliffe; ‖ 1 Bro. P. C. 450.‖

(H) How avoided. (*Revocation by Changes of Estate, &c.*)

Thus, in a devise of lands to A, if afterwards the devisor devises the same lands to B, who was a papist, both devises are void;(*a*) for though the last is void as a will, yet it is good as a revocation.

Vin. Abr. tit. *Devise*, (R), 3, p. 141. ‖(*a*) But by the 18 G. 3, c. 60, papists taking the oath thereby required are empowered to take lands by descent or purchase.‖

‖ Where there was a devise of real estates to be sold, and the produce to be applied in the same manner as the residue of the personal estate, and testator made a codicil, not executed so as to pass real estate revoking the bequest of the residue, it was held that this did not affect the will as to the real estate.

Gallini v. Noble, 3 Meriv. 691; and see Francis v. Collier, 4 Russell, 331.‖

‖2. Of Revocations by subsequent Contracts, Changes of Estate, and Alterations in Circumstances.‖

Per Hardwicke, Lord Chancellor,—The general principle is, that at the time of the devise, the devisor must have a disposing capacity, and an estate in the land devised; and the estate must remain in the same plight and condition until his death: for the least alteration by any act of his makes it a different estate, and shows a different intention, and therefore is an actual revocation. Thus, if one seised in fee devises, then enfeoffs another to the use of himself in fee, though it is the old use that remains, yet it is a revocation, though it is his, on the feoffment. So of a bargain and sale without enrolment. So, if a man, thinking himself tenant in fee, devises, and then, apprehending himself to be only tenant in tail, suffers a recovery with intent to confirm his will, it is a revocation.(*b*) As to mortgages, they are exceptions out of the rule. At law a mortgage for years, and in equity a mortgage in fee, are revocations *pro tanto* only; and the reason is, that a mortgage is only a security;(*b*) and though it be a conveyance of a real estate, yet in this court it is a chattel interest only, and goes to the executor, and it gives no dower. In the case wherein these leading principles were established, after the testator had devised all his manors, lands, tenements, and hereditaments, he by a deed conveyed an advowson which he was seised of at the time of making his will, to, and to the use of trustees and their heirs, in trust to present the church when void to a particular person, if qualified, on the terms prescribed therein; and if such person should be incapable, then to present such clerk as A should nominate; and in default of nomination by him, as the trustees should think fit. The person intended was presented; and on a bill brought by the heir at law of the testator, to have a legal conveyance of the residue of the advowson; the question was, Whether this deed, being only a trust for a particular purpose, as it was alleged, was a total or partial revocation? It was determined by Lord Chancellor, after arguing as above, that it was a total revocation; it being a grant of the legal interest; and the trust was a real and beneficial interest given by it to the trustees, that of nominating themselves in default of A's nominating; and he decreed a conveyance to be made according to the prayer of the bill.

MS. Rep. Sparrow v. Hardcastle, *in Canc.*, Pasc. 27 G. 2; [3 Atk. 798, and Ambl. 224;] ‖7 Term R. 416.‖ [But see 2 Ves. jun. 432, 433.] ‖(*b*) So, also, if a testator, after having made his will, levies a fine to such uses as he shall appoint, and dies without a new will, the will prior to the fine is revoked. Doe v. Dilnot, 2 New R. 401; and see Darley v. Darley, 3 Wils. 6; Brydges v. Chandos, 2 Ves. jun. 430; Parker v. Biscoe, 8 Taunt. 699; 3 Moo. 24. And where the tenant to the *præcipe* was named

Edward, his real name being *Edmund*, the will was still held revoked, as the recovery was good by estoppel against the testator and all claiming under him. Doe v. Llandaff, 2 New R. 491. (*b*) See 6 Ves. 221; 17 Ves. 134; 2 Rob. on Wills. 58. And so the conveyance of a testator's property, effected by his becoming bankrupt, is held no revocation as to the surplus. Charman v. Charman, 14 Ves. 580.‖

J S, seised of a lease for lives, devises it; and afterwards J S surrenders the old lease, and takes a new one to him and his heirs for three lives. Decreed by Lord Chancellor King, that this renewal of the lease was a revocation of the will as to this particular.

3 P. Wms. 166, 170, Marwood v. Turner. For by the surrender of the old lease, J S the testator had put all out of him, had divested himself of the whole interest, so that there being nothing left for the devise to work upon, the will must fail; and the new purchase being of a freehold descendible, could not pass by a will made before such purchase. Ibid. 171. β Roburn v. Shortridge, 2 Blackf. 480.ℊ

So, where a testator devised by his will a leasehold estate under Magdalen College, Oxon, and after the making of his will renewed his lease by surrendering the old one, and making a new lease; it was determined by Lord Chancellor, that this was a revocation of his will. And though the testator, after the renewal, looking among his papers, had said "this is my will," that was held to be no republication.

MS. Rep. Sir Tho. Abney v. Miller *in Can.* Trin. 1743. ‖See Slater v. Norton, 16 Ves. 114; Ibid. 197;‖ [2 Atk. 593; and 2 Ves. 418, S. C. *Note.*—In this case there were two leases, and as to the disposition of one of them the Chancellor held, that the will remained valid, because the lease was incomplete at the testator's death, for although he had surrendered and accepted a new lease, yet it was not sealed with the college seal, till after his death.]

[A testatrix devised all her lands, tenements, and hereditaments at W in Yorkshire, and all her tithes and ecclesiastical dues out of W aforesaid, or any other town or places near the same. At the time of making the will, she was possessed of a lease of these tithes under the Archbishop of York. After making the will, she surrendered this lease, and took a new one, of which she was possessed at the time of her death. The question was, Whether the renewal was a revocation of the will? And the court held, that it was; for there is no real distinction between the words *all my tithes at W*, and the words *all my lease or interest in my lease at W;* because both must refer to the interest she had at the time of making the will. Then that interest did not remain at the death of the testatrix; for, by the surrender, she so far altered her interest, that what were her tithes under the lease at making the will, could not be considered, under the foot of this clause, as being the same at the time of her death; but she acquired a new estate in them, to commence at and run out to a different period of time. It must then be considered, that the testatrix acquired a new interest subsequent the will, and, consequently, such an interest as would not pass by the words used.

Rudstone v. Anderson, 2 Ves. 418.

Again, S by his will, among other devises, gave and devised unto B *the perpetual advowson and disposal of the living or rectory of W for ever, together with the tithes of all sorts thereof.* The rectory of W was held by the testator by lease from New College, Oxford, for the term of ten years. After the will made, the testator surrendered up that lease, and took a new lease from the college for ten years more, and was possessed of the rectory, by virtue of that lease, at the time of his decease. And the question was, Whether the devise of the advowson was revoked

by the surrender and renewal? And it was held, that the surrender and renewal were a revocation.

Hone v. Medcraft, 1 Bro. Chan. R. 261.

It is necessary here to observe, on these cases of revocations of wills respecting leases by subsequent surrender and renewal of the lease, that they turn merely on the penning of the will, viz., whether the words are sufficient to pass the subsequent renewed interest, and not on any inability in point of law to give by will an after-taken lease; and therefore if such lease be disposed of by will by a proper form of words, it will pass notwithstanding any subsequent renewal. As, if a testator give "all his estate, right, and interest, he shall have to come in such lease at the time of his death:" such right of renewal will pass by a general devise of the residue; or by a devise of the lease together with the right of renewal. And in the latter case, if the devisor do nothing, the expiration of the old term will not bar the devisee; because the devise carries the right of renewal as well as the lease itself.

Powell on Devises, 589. Vide Bunter and Cooke, Salk. 237; 1 P. Wms. 575; 2 Atk. 599; 3 Atk. 177.

Upon this principle Lord Hardwicke held, in the case of Sterling v. Lydiard, that where the testator clearly meant to dispose of his whole personal estate, a renewal of a lease, after the will made, was no revocation of it. In the case alluded to, the testator devised in the following manner, viz., "As to *all and singular my leasehold estate*, goods, chattels, and *personal estate* whatsoever, I give the same to my daughter A:" and if she died without issue living, then he limited it over in the same manner to B. In the residuary clause the testator repeated the words "*all and singular, &c.*" After making this will, he renewed a lease *with the dean and chapter of Windsor*. And on the question, Whether this renewal was a revocation of the will as to the lease? Lord Hardwicke said, there was no doubt but the leasehold estate passed by the will. The lease here was not a specific legacy: it was nothing like it. The clause was only an enumeration of the several particulars of the testator's personal estate, but the devise was general of the whole.

Sterling v. Lydiard, 3 Atk. 199.

‖Thomas James, by will, devised life leasehold lands to his wife, and after her decease to his brother's daughters for such estate as should be then to come therein, and directed that the fines for renewal should be paid by his wife during her life, and after her decease, by his brother's three daughters, as such fines became due: he then made a disposition as follows,—"I give and bequeath to my wife Judith James, during her life, all my messuages, lands, and tenements, in Vine Street, in the parish of Lambeth, which I hold in lease under Sir William East, (the premises in question,) for all the residue of my term and interest therein; and after her decease, I give and bequeath the same to my godson Thomas James, his executors and administrators, for all the residue of the term and interest I shall have to come therein at my decease." The testator, at the time of his will, was in possession, under a lease dated 12th August, 1769, granted by Sir William East, of the premises in Vine Street, to hold for twenty-one years, from Lady-day preceding, if the lessor and two other persons should so long live, with a covenant by the lessee, that, in case of the death of any of the said lives (being the lives upon which the lessee held those pre-

mises, with others, from the Archbishop of Canterbury,) before the expiration of the term, and the lessor should renew from the archbishop, he, the lessee, his executors, &c., would pay a proportionate share, with the other tenants, of the fines to the archbishop upon any such renewal; and Sir W. East covenanted, upon such renewal of the original lease by the archbishop, to grant a new lease of the premises thereby demised, for the remainder of the term of twenty-one years, which should be then to come and unexpired: but the lease contained no direct covenant for further renewal. The testator died in December, 1790, the lease, which expired on 25th March preceding, not having been renewed by him, but he had remained in the occupation of the premises until his death, and half a year's rent under this occupation had been paid by him, after the expiration of the lease, during his life. Some time after the testator's death, on the 29th March, 1791, Sir W. E. granted to Judith James a new lease of the premises in question, to hold from the 25th day of March for forty-two years, if three persons named should so long live. The bill was filed by Thomas James named in the will, against the executors of Judith James, the testator's widow, praying that the renewal by Judith James might be declared to be on the trusts of the will. The answer insisted that she took a lease for her own benefit; and this was the question. The Master of the Rolls dismissed the bill, on the ground that the testator contemplated giving nothing beyond the interest which he had existing at his death. On appeal, the Lord Chancellor considered that the equitable question before him must depend on the legal question, whether, if the lease had been renewed to the testator, it would have passed. The construction depended on the whole context of the will: and his lordship thought, that although there was a difference in the leases, the lease in question not containing the same direct covenant for renewal which occurred in the others, yet there was enough in the lease in question pointing that way, to lead the testator to think that the expiration of the term would not put an end to the interest, and some parts of the will were evidently intended to pass the renewed lease.

James v. Dean, 11 Ves. jun. 383.‖

Again, C, in right of a prebend, in 1714, demised certain estates by indenture to one of his children for twenty-one years, and afterwards a surrender was yearly made thereof, and a new lease granted by C. The lessee always executed a declaration of trust, declaring that his or her name was made use of in such lease, in trust for the father for so many years as he should live of the term, and then for such person or persons as he should by deed or will appoint; and in default thereof, to and among his children equally. In January, 1735, C made his will, and, after giving several legacies, bequeathed to his son T *all the rest of his goods, chattels, and estate, whether real or personal, in possession and reversion*, and made him executor. And then came this supplemental clause:—"*Item*, It is my mind and will, that T shall have the disposal of the lease of my prebend of made to my daughter S, and that he shall receive to himself all the *profits* and *advantages* arising from it." Afterwards, in August, 1739, a surrender and new lease was made to S, and a declaration of trust delivered as before mentioned. Then C died; and Lord Hardwicke, upon that part of the case which related to the operation and extent of the words in the will, said that the question was, Whether the benefit of the renewed lease in 1739 passed to T by the will of 1735?

which depended upon the question, Whether the will of 1735 was sufficient to pass not only the trust of the lease then in being, but also the benefit of the subsequent renewals? And he took the construction of this clause in as extensive a manner as if the testator had particularly recited and repeated the lease and declaration of trust, and given it to his son; the effect of which would have been to have given him the whole trust, not the trust of the then existing term only, but also all the renewals; and therefore extended to all future leases as well as those in being. The word *advantages* was undoubtedly sufficient to take in all the advantages and benefits belonging to the trust. It comprised not only the profits but the renewals, which were consequential. The words of the will were very sufficient to pass not only the trust and beneficial interest then subsisting, but also the renewed lease.

Carte v. Carte, 3 Atk. 174.]

|| So, also, Sir Thomas Cave, being seised in fee of estates, agreed by marriage articles to settle the same so as to secure his intended wife's jointure and the portions of younger children, and then upon his eldest son and his heirs male. He then devised the same estates, in case he should happen to die without leaving issue of his body at his decease, subject to any jointure he might make, to trustees for 500 years, on certain trusts; and subject thereto, he devised all his real estate to his uncle the Reverend Charles Cave. The testator, after this will, conveyed the same estates, by lease and release, to releasees, to the use of himself and his heirs, till the marriage, and for default of issue, subject to a term for securing his wife's jointure, to himself in fee. The testator married accordingly, and died without issue, leaving his sister, Mrs. Sarah Otway, his heir at law; and on an ejectment brought against the heir, on the demise of the trustees under the will, the question was, whether the will was revoked by the subsequent settlement; and the Court of Common Pleas, and afterwards the Court of King's Bench, held that it was. As the testator parted with the estate, notwithstanding the old use resulted to him again, still the conveyance operated as a revocation, since it drew out of the testator the subject matter on which the will was to operate.

Goodtitle v. Otway, 1 Bos. & Pul. 576; 7 Term R. 399; and see Cave v. Holford, 2 Ves. 604.

And in the case of Vawser v. Jeffery, (where it was held, that a covenant to surrender copyhold lands previously devised would amount to a revocation, if the surrender would have that effect at law,) Lord Eldon said,—"It is now settled, at least I shall so consider it, until the House of Lords decides the contrary, that if a man devises a fee-simple estate, and afterwards for securing a jointure, instead of limiting a jointure, which would be quite enough, by lease and release, conveys the estate out of which the jointure is to come to the use of himself for life, with remainder to the intent and purpose that the intended wife may take a rent charge, and to the use that she may distrain, and then to enter, with remainder to trustees for ninety-nine years, the better to secure the jointure, with the ultimate remainder to himself and his heirs, although the moment he takes the seal off the wax, his old estate is instantly vested in himself, that is a revocation of the will."

Vawser v. Jeffery, 2 Swanst. 273; 16 Ves. 519.

In the above case, which was sent for argument to the King's Bench, it was there, however, held, that the testator having devised copyhold lands

to A for life, with different remainders over, and having surrendered them to the uses of his will, and afterwards conveying his estates to trustees and their heirs, to secure a jointure to his intended wife, and subject to a term for that purpose to himself in fee, and having surrendered his copyhold lands to those uses, that this did not amount to a total revocation of his will, but that the devisee took the copyhold land, subject to the charge created by the settlement. It was admitted in the argument, that a similar settlement of freeholds would have been a revocation of a previous devise; but in case of copyholds, it was argued the surrender to the uses of the settlement passed no more than was required for effectuating the settlement, and the testator was still in as of his old estate.

Vawser v. Jeffery, 3 Barn. & A. 462; and see S. C. 3 Russ. 479; Hodges v. Green, 4 Russ. 28.‖

If a man devises lands, and afterward mortgages the same for years, and then levies a fine *sur conusance de droit come ceo*, and not a fine *sur concessit;* this will be a revocation: but if there had been a fine *sur concessit*, it had revoked only *pro tanto*.

Vin. Abr. tit. *Devise*, (P), pl. 10.

If A devises lands to B and his heirs, and afterwards mortgages the same lands to J S for years, or in fee, though a mortgage in fee be a total revocation at law, yet in equity it shall be a revocation *pro tanto* only.

1 Vern. 329, 342, 97, 141, 182; 1 Salk. 158, S. P.; {3 Ves. J. 685, Earl Temple v. The Duchess of Chandos; 5 Ves. J. 656, Baxter v. Dyer. See 6 Ves. J. 218, 219, 221, 222, 223; 8 Ves. J. 126.}

‖ And a devise of real estate is not revoked as to the surplus by the bankruptcy of the testator.

Charman v. Charman, 14 Ves. 580.‖

{But though a mortgage in fee, or a conveyance in fee for payment of debts, is only a revocation *pro tanto*, yet if the conveyance operates an alteration of the estate beyond the mere purpose of securing the payment of debts, it is a total revocation.

6 Ves. J. 199, Harmood v. Oglander; 8 Ves. J. 106, S. C.}

So, if a man seised in fee devises it to J S in fee or for life, and afterwards makes a lease to J D for years, this, even at law, shall not be a revocation, but during the years; for this intent does not appear further than during the term for years.

1 Roll. Abr. 616, Montague v. Jeffries; ‖Vin. tit. *Devise*, n.‖

So, if a husband possessed of a term for forty years, devises it to his wife, and after leases the land to another for twenty years, and dies; this lease is not any revocation of the whole estate; but only during the twenty years, and the wife shall have the residue by the devise.

1 Roll. Abr. 616, Wilcox's case.

β Where a testator, after having made his will by which he devises an estate to A, grants a part of it, the will attaches *pro tanto*, and carries it to the devisee.

Brush v. Brush, 11 Ohio, 287.β

But, if A devises lands to B and his heirs, and twelve years after leases the same lands to B for sixty years, to commence after his death, and delivers the deed to a stranger, to the use of B, who does not deliver it to B till after the death of A, this is a revocation of the whole estate; for both estates are not consistent nor can vest in B at the same time; and it

was plainly the intention of the devisor, that B should have the less estate only. And it was so adjudged, though objected, that it was the intention of A that B should have his liberty to take by the lease or devise, B not having agreed to the lease in the life of A.

1 Abr. Eq. Cas. 410.

But, if the lease made to the devisee had been to begin either *in præsenti* or *futuro*, in the life of the devisor, it had not been a revocation, for inasmuch as the lease might have determined in his life, it was consistent with his will.

Cro. Ja. 49, Coke v. Bullock. ‖See Baxter v. Dyer, 5 Ves. 656.‖

So, where A by will devised to his younger son a certain messuage for ninety-nine years, if three lives lived so long, yielding and paying to his sister, the plaintiff, 20*l.* *per annum* until twelve years old, and thence 40*l.* *per annum* for life: and afterwards the said A for 300*l.* fine demised the said messuage to J S for ninety-nine years, if three lives lived so long, yielding and paying 50*l.* *per annum* to A the testator, his heirs and assigns: though it was held at the Rolls to be a revocation, yet on an appeal to my Lord Keeper, he decreed it to be no revocation, and that the daughter should be paid her annuity; and he said, that the rule is, where a subsequent act shall amount to a revocation by implication, it must be a necessary implication: and the act must be wholly inconsistent with the devise.

2 Vern. 495, Lamb v. Parker; 2 Freem. 284, S. C., says, Ld. Keeper seemed to be of opinion, that it was not a revocation, because the three lives in the lease might die before the testator, and then the devise would take place; but referred it to the judges of B. R. by way of a case to determine.

So, where A devised lands to trustees to pay his debts, and then to pay his wife 200*l.* *per annum* for her life; and the testator living several years after, his debts increased from 2000*l.* to 10,000*l.*, for 8000*l.* whereof his said trustees were bound, and afterwards A the testator, by deed and fine, conveyed his lands to his said trustees to sell to pay his debts, and the surplus to him and his heirs: though the wife joined with him in the fine and conveyance, yet this was no revocation of the wife's 200*l.* *per annum*, and she was decreed the 200*l.* *per annum* out of the surplus money after the debts paid.

2 Vern. 241, Vernon v. Jones; 2 Freem. 117, S. C., says, the Lords Commissioners Trevor, Rawlinson, and Hutchins, were of opinion that the surplus being to his own right heirs, that it was still in his own power, and should be subject to his disposal by the will; and the case of Hall and Dench was cited, where, after a devise of lands, the devisor made a mortgage in fee; and adjudged, that the devisee should have the equity of redemption.——Prec. in Chanc. 32, S. C. says, the lords commissioners held that neither the mortgage and fine, nor deed of trust, should be a total revocation of the will, being made for particular purposes; but that after debts paid, the widow should have the 200*l.* *per annum*.

But in a case where Edward Earl of Lincoln had mortgaged the manor of S to the defendant Wynn and his heirs for 12,000*l.*, and afterwards, by his will, in default of issue male of his own body, devised it to Sir Fran. Clinton (who was to succeed him in the honour) for his life, with remainder to his first and other sons in tail-male, with other remainders over; and appointed that his household goods at his chief house at S should remain there as heir-looms to the next heir male, who should be Earl of Lincoln, and made Sir Fran. Clinton executor: afterwards the earl (who was very whimsical) took a fancy to one Mrs. Calvert, daughter to the Lord Baltimore, and fancied he should marry her, though it was proved in the

cause, there never was any intention of such marriage in her, or in any of her relations, nor any treaty about it; and in this fancy he makes a lease and release of those premises to the defendant Davenport and Townshend, and their heirs, (in consideration of the said intended marriage, as it was expressed,) to the use of himself and heirs, till the said intended marriage took effect: then as to part in trust for Mrs. Calvert and her heirs, in lieu of dower, and as to the rest in trust that the trustees should sell it, to disencumber that part limited to Mrs. Calvert, and the surplus of the money to his executors and administrators. There was no farther progress towards the marriage, and some time after the earl died without any alteration of his will, and the honour descended to Sir Fran. Clinton, (who had but a very small estate, if any,) who died soon after; and the plaintiff, his eldest son and heir, an infant of about seven years old, brought his bill to have the redemption of the mortgage, and a conveyance of the estate; and the defendants A, B, and C, who were cousins and coheirs of Earl Edward, brought a cross bill, that they might redeem and have the estate conveyed to them. And the only question was, Whether this lease and release were a revocation of the will? It was said for the plaintiff that the earl had but an equitable interest, the whole estate being before mortgaged in fee, and therefore it ought to be considered according to equity; and that though such a lease and release would have been a revocation of a devise of a legal estate, yet it will not be so here; for the reason the law goes upon in judging it a revocation is, because the lease and release is a conveyance of the estate, and so *ex necessitate rei* a revocation of the devise: and it is plain the law goes upon this, and not upon any supposed alteration in the person's will. For if a man makes a will, and thereby devises lands to J S and his heirs, and afterwards articles to sell the lands to J D and his heirs, and receives the purchase-money, and dies before any conveyance made, these articles will be no revocation of his will: and yet it is as plain his mind and intention, as to those lands, is altered, as much as if he had actually made a conveyance to J D, and in case of an equitable interest, the lease and release makes no alteration of the estate, so as to induce a necessity of adjudging it a revocation, as there is in case of a legal estate: it is plain as to his intention, that he did not intend any revocation or alteration of his will, unless or until that marriage should take effect; for by the release it is limited, that till that marriage it should continue to him and his heirs, which is just as it was before: and that marriage having never taken effect, the estate continues just as it was. And it cannot be pretended, that this lease and release are any express revocation of his will; and the Court of Chancery is so far from following the strict rules of legal revocations, that it often relieves against them. And therefore, if a man devises Blackacre to J S and his heirs, and afterwards mortgages it to J D and his heirs, this, in law, is a revocation of the devise, and yet in equity it shall be none farther than to let in the mortgage; and to this purpose were cited several cases. And therefore, since the court of equity must interpose for one side or the other, it was concluded it ought to interpose for the present earl, and that he ought to have the redemption of the estate, as devised by the will of Earl Edward. For the defendant it was said, that such a lease and release would have been a revocation of a devise of a legal estate, and that equitable estates are governed by the same rules that legal estates are; and there is no fraud or circumvention, nor other equitable circumstances, to

make the court vary from that rule in this case; and the will is in disinherison of the heir, who is always favoured in all courts. And as to the cases put, where mortgages have been held to be no revocation in equity, it was said, the reason of that is, because mortgages are not considered as conveyances of the estate, but only charges upon it: and my Lord Keeper was of this opinion, and decreed the plaintiff's bill to be dismissed, and the coheirs to have the redemption of the mortgage.

1 Abr. Eq. Cas. 411; 2 Freem. 202. Resolved, it was a revocation. And upon an appeal, so held in *Dom. Proc.* by a majority of two lords only. ["This court," meaning a court of equity, "has no authority, nor has ever attempted to exercise an authority, to determine that revocations of wills are subject here to different rules from those that would govern at law." By Lord Ch. Loughborough, 2 Ves. jun. 426. "With regard to all the doctrine of revocation as applied to legal estates in courts of law, courts of equity will apply the same doctrine in equity." By the Master of the Rolls, 2 Ves. jun. 598.]

So, where Sir John Husband, by will in writing dated the 12th of February, 1708, devised several pecuniary and specific legacies, and then gave all the rest of his real and personal estate, after all his debts and legacies paid, to John Pollen, on condition he took the name of Husband upon him, and the heirs male of his body, with divers remainders over: afterwards by lease and release, the 30th of August, 1709, Sir John Husband, together with J S his trustee, conveyed several manors and lands in the county of Warwick to trustees, and their heirs, to the use of himself for life, without impeachment of waste, and that the trustees and their heirs should execute such conveyance and conveyances thereof as the said Sir John by writing under his hand and seal, or by his last will and testament, should direct or appoint; and in 1710 Sir John died, without altering or revoking the said will, or making any other appointment touching the said real estate: the question was, Whether this lease and release were a revocation of the will or not; the original bill of Pollen being to establish the will, and the cross bill to set aside the will, and have an account of the profits. And it was decreed, that the lease and release were a revocation of the will.

1 Abr. Eq. Cas. 412, Pollen v. Husband.

{So if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby.

5 Bos. & Pul. 401, Doe v. Dilmot.

A, seised in fee of the manors of Stamford, &c., and also of the manors of Swinford and South Kilworth, entered into marriage articles by which he agreed to settle his estates so as to secure his intended wife's jointure, and the portions of younger children, and to settle the Stamford estate upon his eldest son in strict settlement, subject to part of such jointure and portions. He then devised all the estates, in case he should die without issue and subject to such jointure as he might make, to trustees for five hundred years, upon certain trusts expressed in the devise. Afterwards by separate deeds of lease and release, he conveyed, 1st, the Stamford estate to trustees in fee to the use of himself in fee till the marriage, with divers limitations in pursuance of the articles, and subject to a term of five hundred years for securing part of his wife's jointure, remainder to himself in fee; 2dly, The Swinford and South Kilworth estate to trustees in fee, to the use of himself in fee till the marriage, and after that to the use and intent that his intended

wife should take the other part of her jointure thereout if she survived him, and after his death, remainder to trustees for five hundred years to secure such jointure, remainder to himself in fee. He afterwards married, and died without issue. It was held that the deeds of settlement, whereby he parted with the whole estates devised, operated as a revocation of the will, though he took back a fee by the same instruments, and though they were consistent with the provisions of the will; and also that the latter estate was not excepted from this revocation by the circumstance of the conveyance of that estate to the trustees being merely for the purpose of creating a term to secure the wife's jointure.

2 Ves. J. 604, n.; 3 Ves. J. 650; 4 Ves. J. 850, Cave v. Holford; 1 Bos. & Pul. 576; 7 Term, 399, Goodtitle v. Otway. Parol evidence of an intention not to revoke was rejected.}

A having issue four daughters, and no male issue, devises lands to trustees, in trust to permit his daughter S to receive the rents and profits until her marriage or death; and in case she married with the consent of two of the trustees and her mother, then to convey the premises to her and her heirs; but, if she died before marriage, or married without such consent, then to convey to other persons: afterwards S married in the lifetime of her father, and with his consent, and he settled part of those lands on her and her husband, and died. And it was held, that this settlement was no revocation of the will, as to the devise of the other lands.

2 Vern. 720, Clarke v. Berkley.

So, J S having four daughters, A, B, C, and D, in 1705, by will devises several parcels of his estate severally to his four daughters, and *inter alia* he devises to trustees all his lands, tenements, and hereditaments in E and F, or either of them, or near thereto adjoining, in trust for A until her marriage or death; and in case she married with the consent of her trustees, then for her and her heirs, or for such person as she should appoint, &c. But in case she married without consent of her trustees, and forfeited her estate, then to her other sisters equally among them, &c. In 1708 the plaintiff Clarke married A with the consent of J S, and he settles upon the marriage (his wife, who had these lands in jointure, joining with him) part of these lands devised to her by his will, after the death of her mother, and also 7*l. per annum* in fee-farm rent, which was doubtful if it passed by the will or not. In 1709 J S died without altering his will. (*Note*, J S, in a letter to Clarke upon the treaty of marriage, declared what he would give him with his daughter in present, and that she would be a better fortune at his death.) *Quere*, If this devise to A in fee, upon condition of marrying with the consent of trustees, be dispensed with or performed by her marrying in J S's lifetime, and with his consent? And Cowper, C.. was of opinion, that by the marriage with the consent of the father, the condition is dispensed with, and the devise become absolute.

Vin. Abr. tit. *Devise* (U), pl. 11; Clarke et ux. v. Lucy et al. For, *per* Lord Chancellor, conditions of this kind, be the conditions precedent or subsequent, are in nature of penalties and forfeitures; and if the substantial part and intent be performed, equity should supply small defects, and favour the devisee; and his lordship observed, that it was admitted that here was no forfeiture; and said, should he take away the estate from the first devisee, when it cannot go to the devisee over, it would descend to heirs at law, which certainly was never the intent of the testator. One question in this case was, If the father giving and settling, upon A's marriage, part of the lands devised to her by the will precedent to the marriage, be a revocation of the whole devise to her, or only *pro tanto*, as was settled on her upon the marriage? And Lord Chancellor

held, that the lands settled by the father, upon the marriage of A, is a revocation only *pro tanto* of the lands devised to her, and not of the whole devise; for implied revocations ought to be plain and certain, and the inconsistency most apparent, which is not so in this case: for why may not the father give his daughter all these lands at his death, though it was not proper for him to part with them all in his lifetime? Though he gave part by deed, why may he not give her the rest by will? Decreed for plaintiff, the wife, for all the lands devised to her by will. Ibid.; and see *antè*, 2 Vern. 720, Clarke v. Berkley, &c.

B, in 1714, by lease and release, conveyed certain estates in H to himself for life, remainder to his first and other sons in tail, remainder to B for life, remainder to his first and other sons in tail, remainder to the right heirs of B, subject to a power of revocation by any deed or writing under his hand and seal, &c., so as that, at the time of such revocation, he settled other land in Yorkshire free from encumbrances to the same uses. B afterwards made his will in 1729, and thereby, among other things, devised *all* his lands in Yorkshire and elsewhere to trustees upon trusts therein mentioned. Then B, in 1730, by lease and release, intended by him as an execution of the power of revocation reserved in the former deeds, conveyed a *distinct* estate in Yorkshire to the uses of the former settlement in 1714, but this estate was deficient in value and subject to a term for securing children's fortunes, and, therefore, the settlement of it not a good execution of the power reserved in the former deed. But the lease and release, in 1730, being made subsequent to the will of 1729, was clearly held to be a revocation of the will *quoad* the devise of the Yorkshire estate, as part of all the testator's lands, &c., in Yorkshire mentioned to be devised by the will; and that estate therefore was not subject to the trusts created thereby.

Burgoyne v. Fox, 1 Atk. 576.

So where a man by his will gave an estate in fee to one of his sisters, and after this made a marriage settlement, wherein he limited the estate in strict settlement, remainder to his own right heirs; that settlement was held, notwithstanding the remainder was limited to his own right heirs, and so the old use, to be a revocation of the whole devise to the sister.

Martin v. Savage, Barnard. 189; S. C. cited 1 Ves. 440.

Again, it was held by Lord Hardwicke, in the case of Bennet and Wade, that a recovery suffered of land after a will made, gave a new estate therein to the tenant to the *præcipe*, although the limitations were to the old uses: and, consequently, that a will thereof made previously was revoked by it.

Bennet v. Wade, 2 Atk. 325; {5 Bos. & Pul. 491, Doe v. Bishop of Landaff, S. P.}

Again, A, being under his marriage settlement tenant for life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail, remainder to himself in fee, made his will, and thereby devised and settled estates as in his will mentioned; and then, by indenture of lease and release, conveyed the same hereditaments to B, his heirs and assigns for ever, and afterwards, by another indenture, reciting the foregoing lease and release, and that the same was to make B tenant to the *præcipe*, for suffering a recovery, the uses whereof were therein declared, as to the lands in question, to be to himself and his heirs. Then a recovery was suffered, after which A the testator died without republishing his will, and without there having been any issue of the marriage. The question was, Whether the deeds executed and the recovery suffered were, under the circumstances of this case, a revocation of the will? The coun-

sel for the devisee argued that, in this case, the deeds and recovery did not amount to a revocation, the same being executed and suffered by A without any intention appearing upon the state of the case to alter or revoke his will; that a recovery by tenant for life, remainder to trustees, &c., was a nullity, an innocent recovery, and in this case nugatory; that A's estate for life was not devisable; that all he could devise was his reversion or remainder in fee, and that thereof he could not suffer a recovery; that the recovery thereof only operated on his life-estate, which amounted to nothing. But the Court of Common Pleas afterwards certified, that the deeds executed, and the recovery suffered, were a revocation of the will, but did not give their reasons for this decision. But the ground thereof seems to have been, that, by the recovery, A drew the whole interest in the land to himself, and got one entire fee, a total new estate in fee which could not be defeated but by the entry of the trustees to preserve contingent remainders; and that his former estate for life, with contingent remainders, &c., and remainder over in fee, were all gone, until the trustees should enter for the forfeiture, which they never did: so that A died seised of an estate in fee in possession of the lands comprised in the settlement, which was a *different* estate from that which he had when he made the will.

Darley v. Darley, 3 Wils. 6; S. C., 7 Bro. P. C. 177.] ‖See Lord Loughborough's remarks in Brydges v. The Duchess of Chandos, 2 Ves. jun. 430.‖

A made his will, and thereof his brother executor, and devised unto his executor all his estate both real and personal, and four years afterwards he marries, and then by a codicil makes his wife his executrix. And the question was, Whether the brother should have the personal estate? And it was urged that he should; for he does not take it as executor only, but by express words of gift in the will, and it appears that there was not only a benefit intended him as executor, for even the real estate was devised to him; but it being in proof that he had not any real estate in the world, it was said by my Lord Chancellor, that the personal estate was designed him only as executor: and it was thereupon decreed for the widow, the executrix.

2 Vern. 23, Wilkinson v. ———.

An alteration of circumstances has been considered as an implied revocation. Thus,

J S, being a bachelor, made his will, and devised a legacy of 500*l.* to his brother, and other legacies to other persons, and devised his real estate to Eliz. Close and her heirs; and afterwards intermarried with the same Eliz. Close, and died, leaving her *privement enseint* with a son, without making any alteration in his will; and the main question in the case was, Whether this alteration in the testator's circumstances did, of itself, without more ado, amount to a revocation? Those who argued for its being a revocation, relied on the case of one Ayres,(*a*) in which it was resolved by the judges, that where a man that was unmarried made a will and devised away his estate, and afterwards married and had a child, and died without making any revocation of his will, this alteration of circumstances was, in itself, a revocation of the will. And a case was cited out of Cicero,(*b*) where one, thinking his son dead, devised his estate to another; yet the son returning, it was held he should have it, because it was not to be supposed he would have disinherited him without reason. On the other side it was argued, that though alteration of circumstances may, in some cases, amount to a revocation of a will, yet it does not in

this case; for there is nothing but what a reasonable man might do, nothing unjust or unjustifiable. It appeared he had an intention of marrying Eliz. Close when he made his will, though perhaps he might not know when he died that his wife was *enseint*, or if he did, yet it is not uncommon for many who are kind to, or fond of their wives, to leave their children wholly in their power, to make them the more dutiful to her, and that he must know the son would be the wife's heir, as well as his; and would have the estate as such, if she did not dispose of it from him. Lord Keeper was clearly of opinion, that alteration of circumstances might be a revocation of a will of lands as well as of a personal estate; and that, notwithstanding the statute of frauds and perjuries, which does not extend to an implied revocation; but no such alteration appears here, for no injury is done any person; for those are provided for, whom the testator was bound to provide for, and so establish the will.

1 Abr. Eq. Cas. 413, Brown v. Thompson, 1 P. Wms. 304, in a note: this reporter says, that this case was heard at the Rolls, 8 Dec. 1701, where Sir John Trevor held, that a subsequent marriage, and having children, was a revocation of a will of land, and dismissed the bill of the legatees, claiming legacies charged on the estate by such will. And the reporter adds, that he finds in the registrar's book, that Wright, Lord Keeper, in July following, reversed the order of dismission, and decreed the payment of the legacies. (*a*) 1 P. Wms. 304, S. C. cited by Sir John Trevor, Master of the Rolls, and appears to have been the case of Eyre v. Eyre, said to be reported to Sir John by Treby, C. J., and some eminent civilians. Ibid. in a note. {1 Wash. 140, Wilcox v. Rootes, S. P.} (*b*) Vide Cic. de Oratore, Cantab. ed. p. 69, 102, &c.; Dig. L. ult. de Hæred. Inst. [Upon the principle which the Master of the Rolls went upon in Brown v. Thompson, it was decided in the Exchequer, upon a will made by one in the lifetime of a former wife who died without issue, whereupon he married a second wife by whom he had issue; that the testator's second marriage, *and having issue* by that marriage, was a total revocation of the will made in the lifetime of the first wife. Christopher v. Christopher, cited in 4 Burr. 2182, in Scacc. 1771. See also Wellington v. Wellington, 4 Burr. 2171.—The same question occurred in the case of Spragge against Stone. In this case there were two wills. The first will was made in Jamaica in 1764, by which the whole estate, real and personal, was devised to a stranger. The testator married in 1765, and had issue in 1766. Afterwards, on the 10th of October, 1766, the testator made another will, which was in his own handwriting, but not duly attested according to the statute of frauds, by which he devised his estate, real and personal, to his wife in trust for his son. It had been decreed in the Court of Chancery in Jamaica, that the marriage and birth of a child, and the second will, amounted to a revocation as to the personalty, but not as to the real estate. But on appeal to the privy council, (Parker, Chief Baron, De Grey, Chief Justice, and Sir Eardly Wilmot, being present,) the decree as to the real estate was reversed, and it was declared, that the subsequent marriage and birth of a child were, in point of law, an implied revocation of the will of 1764. No notice was taken of the second will in the order of reversal. Spragge v. Stone, at the Cockpit, 20th March, 1773, cited in Dougl. 35.] {In the case Ex parte the Earl of Ilchester, 7 Ves. J. 348, 366, it was held by Lord Eldon, assisted by Sir Wm. Grant and Lord Alvanley, that a second marriage and the birth of children, if the wife and children were provided for by settlement, and there were children by the former marriage, was a case of exception from the rule that marriage and the birth of a child revoke a will.—*Quære* whether the birth of more children subsequent to the date of the will, and then the testator's second marriage, by which he has no children, are a revocation. 4 Ves. J. 840, Gibbons v. Count.} ‖See Doe v. Lancashire, 5 Term R. 49; Ex parte Earl of Ilchester, 7 Ves. 348.‖

{A by will provided an annuity for B with whom he cohabited; and directed his trustee and executor, out of his real estate, in case he should have any child or children by B, to raise 3000*l.* to be paid to and amongst his *said children*; and devised the remainder of his estate over to several of his relatives. Afterwards he married B and had several children by her.

(H) How avoided. (*Revocation by Marriage, &c.*)

Such subsequent marriage and births did not revoke his will, the objects having been contemplated and provided for.

5 Ves. J. 663 ; 2 East, 530, Kennebel v. Scrafton.}

Though marriage and the having of children has been deemed a revocation of a will, yet it is only a presumptive revocation ; for if it appears by any expression, or other means, to be the intent of the devisor, that his will should continue in force, the marriage will be no revocation of it.

1 Ld. Raym. 441, Lugg v. Lugg; ‖2 Salk. 592, S. C.‖ β See Coates v. Hughes, 3 Binn. 498 ; Tomlinson v. Tomlinson, 1 Ashm. 224.ℊ

[Thus, J N seised in fee, *inter alia*, of the estates in question, in June, 1770, being a widower without children, and his sister A being his heir at law, made his will in writing duly attested, and thereby devised the same estates to trustees, to the intent that the chancellor, master, and scholars of the University of Cambridge, and their successors, should receive an annuity thereout upon trust to be applied as directed, in a book covered with marble paper, of his own handwriting, &c., by the will referred to ; and subject to and chargeable with the said annuity, and the powers and remedies for recovery thereof, in trust for his own right heirs and assigns for ever. *The will did not contain any devise of any other part of the testator's real estate.* After making this will the testator married ; but previous to the marriage, and after making the will, he conveyed certain lands, of the annual value of 1230*l.*, to trustees for the purpose of securing to his intended wife a clear yearly sum of 800*l.* in case there should be no son of the marriage, and 600*l.* if there should be a son, by way of jointure and in bar of dower, with remainder to himself in fee. The estates *devised by the will* were *not* comprised in this conveyance. The testator had issue of the said marriage one daughter. *After* her birth, he, continuing seised as aforesaid, subscribed his name to another paper-writing in the presence of three witnesses, who, at his request, subscribed their names thereto in his presence and in the presence of each other, the effect of which was as follows : viz., "Memorandum of what J N said in the presence of A, B, and C on the —— day of ——, that as his will was made before he married a second time, he had there devised his estate to his heir male ;" and then, after mentioning other circumstances, it states, "that he also particularly devises, that the college gift may be paid and disposed as he has in the said will directed. The parchment book respecting the college gift is to stand. Mr. B had instructions for this and drew it up." But, before the signing of this paper by J N, he struck out this latter part of the memorandum by drawing his pen across it, saying to the person who reduced it into writing, "*You may draw your pen through what you have now written, for there is a parchment book with the will in the hands of B that mentions all about it.*" Soon after this the testator died. And one question was, Whether this will, and the devise therein to the charity, was revoked by the subsequent marriage and birth of a child? And it was held that it was not; for a subsequent marriage and birth of a child affording a mere presumption, which in this case, as in every other, might be rebutted by every {1} sort of evidence, the declaration of the testator, as to drawing the pen through the latter part of the instrument last executed, and *referring to his will* as a subsisting instrument, was decisive evidence to rebut the presumption, that the change of his circumstances furnished an intent to revoke.

Brady v. Cubitt, Dougl. 31. {1} Vide 4 Ves. J. 848; 5 Ves. J. 664; 2 East, 530.}

But it does not seem that either of these circumstances, viz., marriage and the having of children, would singly suffice to raise the presumption of an intended revocation.

A testator having made his will, after some small legacies to his collateral relations, constituted his wife residuary legatee. After the making of the will, viz., in 1763, his wife was brought to bed of a daughter, upon whose birth the testator added a codicil, whereby he directed that the legacies should be paid, and that an annuity of 300*l. per annum* should be secured on the *residuum* and paid to his daughter. The codicil and will were found together. In 1765 another daughter was born, and in 1768 a son, who was a posthumous child, the testator being dead about six months before his birth. And the question, on a case sent out of Chancery by Lord Camden for the opinion of Sir George Hay, was, Whether the subsequent birth of children was a revocation of this will? And it was determined, that the subsequent birth of children, even in case of personalty, did not amount to a revocation.

Shepherd v. Shepherd, Dougl. 38, note (10).]

|| But it is now settled that marriage, and the birth of a posthumous child, are facts which impliedly revoke a will of lands made before marriage. And Lord Kenyon, in expounding the rule, and referring to the civil law, from whence it is taken, said, that it did not so much depend on the presumption of intention to revoke as on a tacit condition annexed by legal construction to the will, that in such an event the will should not stand.

Doe v. Lancashire, 5 Term R. 49.

But where the testator had married and had children before the will, and afterwards made a will, and then married again, and had children by the second marriage, who were provided for by settlement, this was held an exception to the rule in question, and the will was held not revoked.

Ex parte Earl of Ilchester, 7 Ves. 348.

It is settled, that the revocation only takes place where the children of the second marriage are unprovided for.

Kennebel v. Scrafton, 2 East, 530.

And the birth of a posthumous child alone is not a revocation, though the testator die without leaving children, and do not know of his wife's pregnancy, the court not choosing to go beyond the principle of Doe v. Lancashire.

Doe v. Barford, 4 Maule and S. 10; Shepherd v. Shepherd, 5 Term R. 51, n. Whether the marriage alone of a woman is sufficient to revoke her will, see Forse v. Hembling, 4 Rep. 61 a, and *post*. β In Pennsylvania, the birth of a child is, of itself, sufficient to revoke the will so far as respects the share or proportion of the estate of such child's father. M'Knight v. Read, 1 Whart. 213.β

And where two unmarried sisters, under twenty-one, had made mutual wills in each other's favour, and one married, it was held no revocation of the will of the other.

Hinckley v. Simmonds, 4 Ves. 160.

β A feme sole makes a will, marries, and survives her husband; the will is valid.

Wood v. Bullock, 3 Hawks, 298.β

And where the testator, being a widower, having a son and two daughters, by will gave all his real and personal estate in trust for those children, and in case of their deaths, over, and while they were living married again

and had a daughter, it was held by Sir W. Grant, that the second marriage and birth of the daughter was no revocation of the will. In all the cases, the effect of the revocation had been to let in an after-born heir to an estate disposed of by will before his birth. The condition implied in those cases was, that the testator, when he made his will in favour of a stranger or remote relation, intended that it should not operate if he should have an heir of his own body. In this case there was, he said, no room for the operation of such a condition, as the testator had children at the date of the will, of whom one was his heir apparent, who was alive at the time of the second marriage, of the birth of the children by that marriage, and of the testator's death; upon no rational principle, therefore, could the testator be supposed to have intended to revoke his will on account of the birth of other children, those children not deriving any benefit whatever from the revocation, which would have operated only to let in the eldest son to the whole of that estate which he had by the will divided between that eldest son and the other children of the first marriage. In this case the Ecclesiastical Court had decided that the will was revoked as to personal estate.

Sheath v. York, 1 Ves. & B. 390.

Before the doctrine was settled as to real estate, it had been settled by the Ecclesiastical Courts, with the concurrence of the common-law judges, sitting in the Court of Delegates, that marriage and the birth of a child would amount to a revocation of a will of personal property; and even the implication arising by marriage and birth of children may give way to circumstances.

Forse v. Hembling, 4 Rep. 61 a, and *post*, 580.

Thus, where a man made his will, and thereby bequeathed legacies, and appointed his wife residuary legatee, his wife died, and the testator married again, and had one child by the second wife. He afterwards embarked with his second wife and her son, and all the children of the first marriage. The ship in which they embarked was never afterwards heard of, and was admitted to be lost. After a full and ingenious argument on both sides, Sir William Wynne delivered the judgment of the Ecclesiastical Court, holding, that, under the special circumstances of the case, there was no ground on which to presume a revocation of the will.

Wright v. Netherwood, Salk. R. (Evans's edit.); 2 Rob. on Wills, 117.

In a late case in the Ecclesiastical Court it was held, that the birth of children alone may, in certain circumstances, be sufficient to ground a presumption of revocation; Sir John Nicholl saying, he could not help thinking that the concurrence of marriage was not an essential part, and that the birth of children, after the making of a will by a married man, may have imposed as strong a moral duty upon him, forming the groundwork of presumed intention, and may be accompanied by circumstances for making as indisputable proof of real intention, as if the will had been made previous to the marriage.

Johnson v. Johnson, 1 Phill. R. 477; and see Hollway v. Clarke, 1 Phill. R. 341; Gibbons v. Count, 4 Ves. 848.

And a second marriage and birth of a child have been held, in the same court, a revocation of the will of a widower, notwithstanding the child died in the lifetime of the testator.

Emerson v. Boville, 1 Phill. 342.‖

[A being at variance with his wife, by his will, made in 1739, and exe-

cuted at a tavern, gave all his estate, real and personal, to his brother, and made him executor. And in 1740, A, by a deed poll, gave and granted to his wife *all his substance* which he then had or might thereafter have. The question was, Whether this will was revoked by the deed poll? *Et per* Lord Chancellor, The latter instrument cannot take effect as a grant or deed of gift to the wife; because the law will not permit a man to make a grant or conveyance to his wife in his lifetime, neither will a court of equity suffer the wife to have the whole of the husband's estate while he is living; for it is not in the nature of a provision, which is all the wife is entitled to. But then, another consideration remains, viz., though it cannot take effect as a grant to the wife, yet, whether it be not an act so inconsistent and repugnant to the will, that it may, though an act not strictly legal, amount to a revocation? And his lordship said, that he was of opinion it was, and declared, that the will was revoked as to all *the personal estate* by the deed poll.

Beard v. Beard, 3 Atk. 72. ‖ These imperfect instruments are revocations, not on the ground of indicating an intention to revoke, but because they import an intention of altering the condition of the estate, which the law holds to be an act of revocation. See *per* Lord Hardwicke, Ambl. 216; 2 Atk. 598; 7 Term R. 416.‖ Note. The deed poll only extended to personal estate.

‖ Where a tenant to the *præcipe* is made for the purpose of suffering a recovery, and no other proceedings are had, a previous will is nevertheless revoked.

Harmood v. Oglander, 6 Ves. 199.

Whether a deed, intended to operate as an appointment to uses, but incapable of operating as a valid appointment from a deficiency of power in the party executing the deed, or a neglect of some formality necessary in its execution, may still have effect as a revocation of a will, does not seem clearly settled; though Lord Kenyon, in one case where the point was not adjudicated, thought the deed was a revocation.

Shove v. Pinck, 5 Term R. 124, 310; and see Lord Alvanley's observations, 7 Ves. 374, where it was decided that a testamentary appointment of a guardian was not revoked by a subsequent testamentary appointment not executed according to the statute and not strictly importing revocation; ‖ and see Eilbeck v. Wood, 1 Russell, 564.‖

The testatrix, by will duly executed, devised all her freehold property to trustees for the use of B, and seven days after executing the will, she conveyed a part of her property to trustees for a charitable foundation, pursuant to the statute of mortmain, 9 G. 2, c. 36, and nine days afterwards she made a codicil, attested by three witnesses, to be taken as part of her will; by which codicil she appointed another trustee, and ordered her money out on mortgage to be first applied in payment of her debts. The testatrix died within twelve months after the deed was executed pursuant to the statute. The third section of the statute provides, that no lands shall be given for charitable uses, unless by deed executed before two witnesses, twelve months before the death of the donor. The court held, that the will was not revoked by the indenture.

Matthews v. Venables, 2 Bing. R. 136.

Where a deed is void as being covinously made, it seems clearly held to be incapable of operating as a revocation for its complete nullity; and in a court of equity, a deed obtained by fraud or compulsion, has, in a case before Lord Thurlow, been held equally inoperative against a subsisting will. His lordship observed, that the reason against admitting such an instrument

to have the effect of a revocation was strong in that court, since, when application is made by a proper party, it will be ordered to be delivered up, and then it is implicitly declared to be no need.

Hawes v. Wyatt, 3 Bro. C. C. 156; and see 7 Ves. 348; 6 Ves. 215.‖

M made her will, and thereby devised a messuage in L, to her sister for life, and after her decease to trustees to sell the same, and to apply 200*l.*, part of the produce thereof, to A, and other parts to other persons, and gave the residue to C. After the making of the will, the testatrix sold the estate for 2500*l.*, part of which was left on mortgage of the estate, and the remainder laid out in the purchase of stock. Then the testatrix died without republishing the will; and the question was, Whether this sale was a revocation of the will? And it was held that it was, for there was an absolute disposition made by the will, and, before that could take effect, another absolute disposition inconsistent with it.

Arnold v. Arnold, 1 Bro. Ch. R. 401.]

A devise was made of a term carved out of an inheritance for ninety-nine years, before the statute of 3 & 4 W. & M. c. 14, of fraudulent devises, in trust to pay 14*l. per annum* to a grand-daughter for life; and after the making of this will, the devisor mortgaged this land for five hundred years (which is a revocation in law for the term, but the devisee has an equity to redeem the mortgage;) the mortgagee assigns over the mortgage to the plaintiff, who was a creditor by bond to the testator, and the reversion in fee descended to the testator's heir at law. *Per* Cowper, Chancellor,—The mortgage is a revocation *pro tanto* of the devise of the annuity, and she must keep down the interest, or pay a third part of the redemption; but being a devisee, she may redeem the mortgage without paying the bond.

Vin. Abr. tit. *Devise* (Y), pl. 2, Saunders v. Hawkins.

A devises lands to an executor for payment of debts, and recites that a particular schedule of them was annexed to the will, remainder over. Afterwards he mortgages part of the said lands, and pays most of the schedule debts with the money. And it was decreed, that this mortgage is not a revocation, either in all or part, and that the will ought to extend to all the debts that should be owing at the time of his death, and not to the schedule debts only; and that the mortgage was only a security, and not an appointment how it should be made. But this decree was reversed, though without prejudice to the heir at law.

Vin. Abr. tit. *Devise* (R), 6, pl. 25, Bernardiston v. Carter.

If lands are devised to one in fee, and afterwards mortgaged to the same devisee, it is a revocation *in toto*, being inconsistent with the devise; though it was agreed, if the mortgage had been to a stranger, it had been a revocation *quoad* the mortgage only. Decreed *per* Lord Macclesfield.

Prec. in Chan. 514, Harkness v. Bayley; {5 Ves. J. 656, Baxter v. Dyer, expressly *contrà*, and this case said to be totally misreported. Ibid. 664, Peach v. Phillips, also *contra.*} ‖ But see Lord Eldon's note of this case, 5 Ves. 661, from which it appears the transaction was not a mortgage, and the conveyance was clearly inconsistent with the devise; and Lord Eldon accordingly, in Baxter v. Dyer, 5 Ves. 656, held, that a mortgage to the devisee was not a revocation of the devise.‖

J S, by his will, gives his daughter 500*l.* for her portion, and afterwards marries her to A, and gives her 300*l.* for her portion in marriage, and lived four years after, without revoking his will. Afterwards the husband

is a bankrupt, and the assignees brought a bill against the father's executor for the 500*l.*, or at least to recover 200*l.* to make up the portion *tantamount* to the 500*l.* legacy. Lord Chancellor Parker with great clearness held, that giving a daughter a portion by will, and afterwards a portion in marriage, is by the law of all other nations, as well as Great Britain, a revocation of the portion given by the will; and dismissed the bill with costs.

1 P. Wms. 681, Hartop v. Whitmore; Prec. in Chan. 541, S. C., states it thus: J S by will gave 300*l.* portion to M his daughter, if she married with her mother's consent, but if not, then 200*l.* only; M afterwards, in the lifetime of her father and mother, married without the consent of either of them, but the father was afterwards prevailed on to give her 200*l.* and died without altering his will. M's husband afterwards becoming a bankrupt, his assignees brought a bill to have the 300*l.*, or at least the 200*l.* given M by her father's will; but the bill was dismissed, for that the 200*l.* given by the father in his lifetime was a satisfaction of the legacy, and a revocation of the will as to that portion; and the 300*l.* was to take place on her marrying with her mother's consent, which could only be intended after the father's death, and consequently the legacy never became due at all. [Vide *suprà Legacies* (D).]

Testatrix having three daughters, A, E, and M, by will devised 1000*l.* to A, 800*l.* to E, and 500*l.* to M. After this will was made, plaintiff courted A, and upon a treaty of marriage, testatrix gave a note for 500*l.* payable within six months after the marriage to plaintiff, in augmentation of her daughter's portion left by her father; and the next day the marriage was had; and upon the same day the testatrix was taken ill, and died six days after, without altering or making a new will: but she declared, that she intended that her daughter A should have but 1000*l.* from her, and that now since she had given her this 500*l.* she must alter her will; and sent for an attorney to do it; but when he came she was light-headed, and died soon after. And it was said by the defendants, the executors, that the testator's assets were not sufficient to pay the plaintiff the 500*l.* upon the note, and the 1000*l.* legacy, and likewise the legacy left to the other two daughters. And two points were made: first, If this 500*l.* note shall be taken in part of satisfaction of the 1000*l.* legacy? Secondly, If parol evidence shall be admitted to prove the intent of the testatrix? And *per* Lord Chancellor Parker,—The circumstances of testatrix and her family may be given in evidence to expound the will, but not any parol declarations to explain the words of the will, or to control it; that in this case there is no doubt upon the words of the will; but the question is, If the testatrix has not advanced part of the legacy in her lifetime upon the marriage of her daughter? And the evidence is only as to the satisfaction; and thereupon his lordship admitted the evidence to be read; and directed the Master to see if there were assets sufficient to pay all the legacies; and upon report, the court to determine as to the *quantum* due to the plaintiff.

Vin. Abr. tit. *Devise* (Y), 2, pl. 10, Pepper et ux. v. Winyeve et ux.

J S devised to M his wife six houses in bar of dower, and, subject to his legacies, he devised (the rest of) his real and personal estate to his two daughters and their heirs, in moieties; and afterwards, in consideration of the marriage of A his eldest daughter with B, J S by marriage articles covenanted to settle one moiety of his real estate to the use of himself for life, remainder to the use of the said B and A his intended wife for their lives, remainder to the younger children of the marriage in tail general, remainder to the said B in fee; and also covenanted that he would stand possessed of one moiety of all such personal estate as he should leave at

his death (subject only to his debts, and such legacies as should amount to 5000*l.*) in trust for B and his said intended wife for their lives, and afterwards to be paid to their younger children. Lord Chancellor King held, that though this was but a covenant, and therefore at law no revocation of the will by which the testator had disposed of his real estate, yet that the same being for a valuable consideration, was in equity *tantamount* to a conveyance, and, consequently, in equity a revocation of the will as to the moiety of the six houses devised to the testator's wife, so that B was entitled to one clear moiety of the real estate, and to an account of the rents, &c., thereof, from J S's death; but as to the six houses devised to the testator's wife, it being his intent that she should have them, the court held, that she should have a satisfaction out of the remaining moiety, and that the wife should not suffer by the marriage-articles, there being enough out of the other moiety to supply and satisfy the devise of the six houses to her. Therefore, as to the other moiety of the real estate, it was decreed, that the testator's widow was to have for her life six houses, part thereof, and the residue of such moiety subject to the wife's estate for life in the six houses to be divided between the two daughters equally.

2 P. Wms. 328, Rider v. Wager. And his lordship thought this case the stronger, because, after the marriage-articles entered into J S had executed a codicil, confirming his will subject to the articles, which confirmation was a republication of his will, and as if he had written it over again, or had afterward for a valuable consideration assigned over a moiety of his real and personal estate to his eldest daughter, by which the said moiety thus disposed of did no longer continue any part of the said J S's estate; so that the testator afterward, by devising a moiety of his real and personal estate, must be intended to have meant the remaining moiety only, and to have divided that moiety into moieties. Ibid. 334. *Note.* After the making of the will and codicil, the testator and his wife, by lease and release and fine, mortgaged the premises; and it was urged that this was a revocation of the will; but *per* Lord Chancellor,—It can only be a revocation *pro tanto.* Ibid. 334. ‖See *post*, 578, and 6 Ves. 654, Vawser v. Jeffery; 16 Ves. 519.‖

J S on his marriage with F's daughter settled 500*l.* *per ann.* on her; he afterwards surrendered some copyhold estates to the use of his will which he made, and gave the copyhold to his wife. Afterwards J S, on the death of his wife's father, became entitled to 1500*l.* in right of his wife; then J S levied a fine, and made a new settlement, and increased her jointure 300*l.* *per ann.*, but never altered his will. And *per* Lord Chancellor, —The settlement is a revocation of the will, for such lands as are comprised in it; but the copyhold is not, and therefore passes by the will.

Select Cases in Chanc. 48, Lannoy v. Lannoy.

J S, in 1699, leaves to A 8784*l.* in trust, to be by her invested in lands, and to settle the same on herself for life, remainder to the heirs of B. A decree was had against A to lay out the money in lands, and to settle the same according to J S's will. A purchases lands to the value of 3300*l.*, and devises those lands to C (who was heir at law to B) and her heirs, and gives several legacies, which could not be paid if the devise were not to be taken as part of satisfaction; and for that reason it was so decreed by Lord Chancellor King.

Select Cases in Chanc. 63, Gibson v. Scudamore.

A and B were tenants in common of lands in fee. A by will dated 25th Jan., 1719, devises her moiety of the said lands unto trustees and their heirs, upon trust to sell the same for the purposes therein mentioned; and afterwards A and B made partition by deed, dated 16th May, 1722, and a fine was levied, and the uses were declared to be, as to one moiety in seve-

ralty to A in fee, and as to the other moiety in severalty to B in fee. In 1724 A died without revoking or altering her said will, leaving J S her only son. Lord Chancellor declared, that the will was well proved; but referred it to the judges of B. R., Whether the deed of 16th May, 1722, and the fine levied pursuant thereto, was not a revocation of the will? And Raymond, C. J., Page, Probyn, and Lee, Justices, certified their opinions to be, that the will was not revoked by this deed and fine, and that A's share of the land contained in this deed and fine passed by the will.

Vin. Abr. tit. *Devise* (R), 6, pl. 30; Luther v. Kirby, 3 P. Wms. 169, by way of note cites S. C. by the name of Luther v. Kidby, and says, the judge's certificate appears to be so by the registrar's book; with which Lord Chanc. King concurred, and ordered that the several trusts in A's will should be established. [So, Swift v. Roberts, 3 Burr. 1490; Bridges v. Duchess of Chandois, 2 Ves. jun. 429.] It is added in P. Wm.'s report, that if A devises lands and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption.——See Salk. 341. Lloyd and the Lord of Say and Seale; and yet this is a hard case, since by the caption the party conusor does all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

[But, if the conveyance, by which a partition is made, be for any other purpose except merely that of partition, though it be nothing more than conveying the estate to such uses as the party may appoint, it will operate as a revocation of a will previously made.

{7 Ves. J. 564; 8 Ves. J. 281; 10 Ves. J. 256, 264.}

Thus, where T died in 1741, seised in fee of lands which were gavelkind, leaving two sons R and H, who both entered therein upon their father's death, and were each seised of an undivided moiety thereof; and, they being so seised, R made his will, and devised all his lands and tenements and all his moiety to his wife: afterwards a deed of partition was made and executed by and between R and H, and the lands in question were allotted to R, and it was covenanted therein, that they and their wives should all join in levying a fine, (which was done,) and that the same, as to the lands in question, should enure to the use of R and such person and persons, and for such estate and estates, as he should, by deed or will, limit, direct, or appoint; and, in default of such appointment, to the use of R in fee: Lord Chief Justice Lee held this to be clearly a revocation of the will, and not like the case of a *bare* partition only unattended by a fine or conveyance to a new use, which would not have been a revocation.

Tickner v. Tickner, cited 1 Wils. 309, and 3 Atk. 742, 745, 750. So, Brydges v. Duchess of Chandois, 2 Ves. jun. 429. ‖Lord Eldon has observed upon these cases of Luther v. Kidby, and Tickner v. Tickner, that "mere partition, whether by compulsion or agreement, is not a revocation of a will; but the slightest addition as a power of appointment prior to the limitation of the uses is sufficient." Knolleys v. Alcock, 7 Ves. 564. And again:—"The case of partition is a sort of special case. Each party can compel the other to make partition; the estate is the same, though enjoyed afterwards in a different quality and in another mode. And upon a principle compounded a little of these two reasons, it has been held that that which can be compelled, if done voluntarily, and provided nothing more is done than mere partition, shall not revoke the will. I say, provided nothing more is done: for it has been long established, that if the object is to do anything beyond the partition, it will be a revocation. It is tried by the fact, whether the acts demonstrate any intention to go beyond the mere partition; and, notwithstanding the expressions of the judges in some of the reports, that Luther v. Kidby and Tickner v. Tickner cannot stand together, they have stood together a considerable time, and in my opinion are perfectly reconcilable." Attorney-General v. Vigors, 8 Ves. 281; and see Maundrell v. Maundrell, 10 Ves. 256.‖

{And if the partition is of such a nature as to deprive the testator of all

interest in the land described in the will, it will be a revocation. Thus if F and P are coparceners of estates in the counties of B, L and O, and F devises all his real estates in the counties of L and O, and afterwards partition is made, by which the estates in the county of B are allotted to F, and those in the counties of L and O to P, the will is revoked: nor has the devisee any right to compensation from the heir.

5 Ves. J. 648, Knollys v. Alcock; 7 Ves. J. 558, S. C.

An exchange revokes a previous devise, though the land after the death of the devisor be restored to his heir, under an arrangement made in consequence of a defect discovered in the title of the other party to the exchange.

8 Ves. J. 256, 278, Attorney-General v. Vigor.}

By marriage articles it was agreed, that the wife's lands, whereof she was seised in tail, should be conveyed to the husband in fee: they married: the husband made his will and devised these lands: then the husband and wife suffered a recovery of these lands, to such uses, and for such estates, as they should jointly appoint, and in default of such appointment to the use of the husband and his heirs. She died without appointing. *Per* Hardwicke, Ch.—This amounts to a revocation of the will. And in this case the following rules were laid down.

MS. Rep. Parsons v. Freeman, M. 25 G. 2; [3 Atk. 741, S. C.; Ambl. 116, S. C.; 1 Wms. 341, S. C. The introductory part of this argument is thus stated by Lord Loughborough in 2 Ves. jun. 431, from my Lord Hardwicke's notes:—"It is admitted, that if the testator had been seised in fee at the date of the will, and had afterwards suffered a recovery, that would be a revocation; and yet the objection would have held equally there of the alteration being made only for the particular purpose of enabling him and his wife to dispose without any other form of conveyance. There are a great variety of cases, and nice and artificial distinctions, upon the favour to the heir. One rule, however, is certain; that if a man is seised in fee, and disposes by will, and afterwards makes a conveyance, taking back a new estate, that is a revocation; so, if he devises the land, and levies a fine without any use declared, this is a revocation, and yet he takes back the old use unaltered, which is a prodigiously strong case. But these cases admit of limitations and distinctions; and therefore if a testator makes a conveyance for life or years, that being a particular, *partial* purpose, no more than will answer that purpose is revoked; the line being drawn, and the purpose specified with a declared intent of going thus far and no farther. These are the rules of law: the counsel have doubted whether they extend to equitable interest, without citing authorities; but I think they hold in equity, and am of opinion that what is a revocation at law shall hold in equity; as it would be very mischievous, that the same sort of conveyance should not be a revocation in both cases. Therefore, if a man having an equitable estate makes his will, and then executes a conveyance, and disposes of it, or declares the uses to himself, that will be a revocation, if it would be so of a legal estate at law. But still this revocation follows the rule of law; and therefore if the conveyance be of part only, and for a particular, *partial* purpose, it shall be a revocation *pro tanto* only Upon this principle is Vernon v. Jones; so, Ogle v. Cooke, that where the conveyance amounts only to a security, it is only a charge upon the land, and no revocation; and as the heir may in all those cases have the surplus, so shall the devisee." ‖Where a testator seised in fee of an estate, devised it, and after making his will, conveyed it, by way of mortgage, to trustees, with a proviso in the deed, that on payment of the money, the mortgagees should reconvey to him, his heirs, and assigns, or to such persons as he should appoint by deed in writing, it was held, the conveyance was only a revocation of the will *pro tanto*, notwithstanding the trust to convey to such persons as the mortgagor should appoint; for this provision gave no new power of conveyance to the testator. Brain v. Brain, 6 Madd. 221; *sed* vide Ward v. Moore, 4 Madd. 368. But where a man devised an estate of which he was equitably seised, under a contract to purchase it, and the estate was afterwards conveyed to trustees to such uses as the devisor should appoint by deed, with two witnesses, or will, with remainder to the trustee for the life of the devisor, to bar dower, and to the devisor in fee, the will was held to be revoked by the conveyance. Rawlins v. Burges, 2 Ves. & B. 382.‖

If a man seised in fee devises, and then makes a conveyance by fine, feoffment, or recovery, and takes back a new estate, it is certainly a revocation; and so if he takes back the old use unaltered, from a presumption that he could not have made such a conveyance without an intention to alter his will: but if after making his will he had made a lease, or charged it with a sum of money, &c., it would only have been a revocation *pro tanto*. The rules are the same in the devise of a real, and of a personal estate, with regard to charges made afterward: but if a man, having an equitable estate in fee, devises it, and then takes a conveyance of the legal estate, it is no revocation. The equitable estate will not pass by will, but the heir at law by descent of the legal estate may become a trustee for the devisee, who may call for a conveyance of the estate. If a man contracts by articles for the purchase of lands, and, before a conveyance, devises the lands and dies; the devisee shall have the lands and call for a conveyance from the vendor. If a man, seised of a legal estate, makes his will, and then conveys the legal estate to another in trust for himself, it is a revocation. If in this case the husband had only taken the legal estate by the recovery to execute it into the equitable estate, it would have been no revocation; but new uses are appointed, and though the wife died without making any appointment, that will not alter the case, for here he took the fee by the recovery differently qualified, subject to different conditions, differently conveyed. But, if two parceners make partition, levy a fine, and declare the use, that will not be a revocation, because it is to effectuate the partition.

‖If the owner of an unqualified equitable fee devise it by his will, and afterwards takes a conveyance of the unqualified legal fee, this is no revocation of the will, because the conveyance was incident to the equitable fee. But if he afterwards takes a qualified conveyance of the legal fee for the purpose of preventing dower, it is a revocation of the will, being a change in the quality of the estate and not incident to the equitable fee.‖

Ward v. Moore, 4 Madd. 368; ‖and see p. 577.‖

[S in 1733 surrendered copyhold tenements to the use of T and B his wife, for their lives, remainder to the heirs and assigns of T, and they were accordingly admitted; and then T surrendered to the use of his will. B died, leaving issue by T—G the eldest, and I the youngest son. In 1744, T the father surrendered these tenements to the intent that the lord should regrant them to the use of T and his heirs until his marriage with S, and then to the use of T and S for their respective lives, remainder to the heirs of their two bodies, *remainder to the right heirs of T.* No admission was had by T under this surrender. Afterwards, viz., in 1757, T devised the estates to S his wife for life, remainder to I his youngest son, and M his wife, for their respective lives, and died, leaving S his widow, and G his eldest son and heir. In 1759, S was admitted for her life on the former surrender made on her marriage, and then G the son was admitted to the reversion expectant on her decease. I, the youngest son, died: then S the tenant for life died. Afterwards M, the widow of I, was admitted by virtue of the will of T and the surrender to the use thereof. The question was, Whether by the subsequent acts, the surrender to the use of the will was at an end? It was argued that, by the surrender in 1744, every thing passed out of T the devisor, consequently there was an end of the surrender to the use of his will in 1733; and, he never having been admitted, nor of course surrendered to the use of his will, in consequence of the new

limitation in 1744, nothing passed by the will of 1757. *Sed per curiam*, unanimously,—The old use in fee granted to T in 1733, to which he was then admitted, and which was surrendered to the use of his will, was not taken out of him by the new limitation and surrender of 1744. He had therefore no occasion to be re-admitted to it for the purpose of surrendering to the use of his will, but shall be construed to be in of his old estate.

Thrustout on the dem. of Gower v. Cunningham, 2 Black. R. 1046.] ‖See Vawser v. Jeffery, 3 Barn. & A. 468; 2 Swanst. 268.‖

A being seised in fee, settled his estate by lease and release in 1712, to the uses thereinafter specified, with liberty, nevertheless, at his will and pleasure, to dispose of, alienate, or change the said estate, or any part thereof, for any estate or estates whatsoever, as he should think fit, and to revoke all and every the uses thereby limited; and then declares the uses to himself for life, with several remainders, and a remainder over to D in (fee) tail. The said deed contained the following powers: first, a power for A by any deed or writing, signed, sealed, and delivered in the presence of two or more witnesses, to demise, lease, limit, or appoint the said premises to any person whatsoever, for any term or terms whatsoever, and for so much yearly rent as he should think fit. And that it shall and may be lawful to and for the said A at any time during his natural life, at his will and pleasure, to grant, sell, or demise the said premises, or any part thereof, or by any deed or writing under his hand and seal, or by his last will, &c., in writing, signed, sealed, delivered, and published in the presence of three or more witnesses, to revoke, repeal, and make void all and every or any the use and uses, estate and estates, trusts, and limitations before raised, and to declare or limit the same, or such new uses as should seem most meet to him, and then and from thenceforth, the estates before limited and so revoked, to cease, &c.: and that the said A may dispose of the same premises, and every part thereof, to such other person and uses as he shall think fit; any thing, &c., to the contrary notwithstanding. The first part of this proviso, viz., "to grant, sell, or demise," appears inserted by interlineation. In 1715, A by lease and release, reciting that he was indebted as specified in a schedule annexed, conveyed his estate to W R and W S and their heirs, in trust to pay the said debts by the annual profits, or mortgage or sale of the premises, and after payment thereof, to pay the overplus, if any, and reconvey such parts of the premises as should remain unsold, to the said A, or to such person and persons, and to such uses, &c., as A by any deed or writing, under his hand and seal, attested by two or more credible witnesses, should limit, &c. This release was attested by two witnesses only. A died without issue. Lord Chancellor, assisted by Lord Chief Baron Reynolds and the Master of the Rolls, was of opinion, that A intended to reserve an absolute power over this estate, and either to revoke it by an express revocation, or by a conveyance to different uses, which are the two kinds of revocation, as is evident as well from the preamble, which is interwoven with the consideration of the deed, as from the proviso: and in consequence of that intention, it is reasonable to suppose he meant to have a power to defeat it, without taking any notice of it; and if no power had been reserved in the body of the deed, then would the preamble have given a general power. That a conveyance to different uses would have been a revocation as effectual as an express revocation, and that he thought any other construction would be forced and unnatural. That if A had stopped with the first words of the proviso, viz., "to grant, sell, or demise," he had

reserved an absolute power. Then come the words, "or by any deed or writing." *Or* is plainly a disjunctive introductory of a different sentence, and a different power, which is plain by the words immediately following, viz., "And then the uses so revoked and repealed," which refer to the express power of revocation. That if the second part of the clause, "or by any deed or writing," &c., had been dropped, and it had been, "or to repeal," &c., it is plain they would be distinct powers: and his lordship asked, Why those words should alter the case? that the circumstance of three witnesses is only applicable to the express revocation; but it neither goes to the first power, nor to the general power of disposing at the end of the clause, viz., "And that the said A shall and may dispose," &c., which is as much a distinct power as can be, and is larger than the first; for by this he might give his estate (tail) by will. That the express power of revocation could not by this construction be thought nugatory, for within the first power he could not be reinstated in his former estate without a conveyance and reconveyance; nor could he have devised it. But admitting it to be so, he thought general intention is not to be superseded, because a subsequent part of the deed is surplusage: and that the whole legal estate passed to the trustees by the deed of 1715. Decreed 12 June, 1730.

Lill. Prac. Conv. 390, 400, Fitzgerald v. Lord Fauconberge; Fitzgibb. R. 207, S. C.; and as to the interlineation, the Lord Ch. said, that the party that put it in thought it would be of some use or other, and it could be of no use but to give A an unlimited power over the estate; and as A's intention was to reserve such a power, his lordship said he would not abridge it. Ibid. 223.

Though a covenant or articles do not at law revoke a will, yet if entered into for a valuable consideration, amounting in equity to a conveyance,(*a*) they must consequently be an equitable revocation of a will, or of any writing in nature thereof. A woman's marriage is alone a revocation of her will.(*b*)

2 P. Wms. 624, Cotter v. Layer. (*a*) See S. P. resolved in the case of Sir Barnham Ryder and Sir Charles Wager, Ibid. 332. ‖ Bennett v. Tankerville, 19 Ves. 170.‖ (*b*) See 4 Rep. 61. [But if the husband die in the lifetime of the wife, then the will, it seems, will revive, and on her death afterwards take effect as if no marriage had intervened. Therefore, saith Serjt. Manwood in Brett v. Rigden, Plowd. 343, a, if a feme sole make her will the 1st day of May, and give land thereby, and afterwards, the 10th day of May, she take husband, who dies the 20th day of May, and afterwards the woman die the 30th day of May, the devise is good; for it does not take effect until her death, at which time she was discovert, as she was at the time of making the will. —And it is observable, that the case of Forse v. Hembling, 4 Rep. 61, wherein it was adjudged, that the will of a feme sole was revoked by marriage, does not seem to impeach the case here put, for the reason given; for that judgment is not only because she afterwards married, but also because she was covert baron at the time of her death. And it is to be noted, that it is only upon the authority of Forse v. Hembling, that the Lord Chancellor King delivers in so unqualified a manner the doctrine in the text, that a woman's marriage is alone a revocation of her will. ‖ It seems that in Mrs. Lewis's case it was held, that a will made by a woman before marriage, was so totally revoked by her marriage, that it could not revive on the subsequent death of her husband. 4 Burn, E. L. c. 47; and see Doe v. Steeple, 2 Term R. 684.‖

{If two unmarried sisters make mutual wills in favour of each other, the marriage of the one does not revoke the will of the other.

4 Ves. J. 160, Hinckley v. Simmons. See 3 Ves. J. 402, Lord Walpole v. Lord Orford.}

[By articles made in 1777, previously to the marriage of the Duke of Chandos, the duke covenanted that he would, within six months after the marriage cause various freehold and copyhold estates to be well and

effectually conveyed, so that he might be seised thereof, to the intent that, in case the duchess should survive him, she might become entitled to dower; and also that he would, within twelve months after the marriage and after such conveyances, settle the said estates, subject to the dower of the duchess, to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder, after the decease of the duke and duchess, to trustees for a term of years, to raise portions for younger children; and subject thereto and to dower, to the use of the first and other sons in tail male, with remainder to the right heirs of the duke. The duke also covenanted, that in case the dower should not be equivalent to 2000*l. per annum*, his heirs, executors, or administrators would make good the deficiency. By his will, bearing date Jan. 9th, 1780, the duke confirmed the articles; and all the real estates, which he had by the articles agreed to settle, he devised, in case he should die without issue male, or in case of failure of issue male in his wife's lifetime, to his wife for life, remainder to his daughters as tenants in common in tail, with other limitations. The duke afterward executed a settlement, by which he disposed of the fee, and which purported to be in execution and performance of the articles; but in truth contained many clauses and modifications inconsistent both with the articles and will. Lord Chancellor Loughborough held, that as the settlement did not pursue the articles, it could not be referred to them, so as to form one instrument, and was therefore a revocation of the will.

Brydges v. Duchess of Chandos, 2 Ves. jun. 417. ‖See Rob. on Wills, 2, p. 61.‖

But where, by articles prior to marriage, the husband being seised in fee, covenanted to convey his estates to trustees, to the use of himself for life, remainder in trust to secure an annuity to his wife in bar of dower, remainder to trustees for years to raise portions, remainder to the sons and daughters successively in tail, remainder to his own right heirs, and afterwards made his will, and devised the reversion in fee in the event of his dying without issue; and subsequent to the will executed a settlement in pursuance of the articles, by which he conveyed the estates to trustees and their heirs, upon the trusts and to the uses of the articles: it was holden with great clearness, that the will was not revoked by this settlement; that the settlement was nothing more than a mere legal execution of the articles: nothing more than giving the legal estate in lieu of the equitable estate, of which the testator was seised at the time of making the will; that the testator devised nothing more than the reversion in fee; that his acquiring the legal interest made no difference; and that the person to whom the estate was conveyed was a trustee for the purposes of the will.

Williams v. Owen, 2 Ves. jun. 395. ‖See Lord Alvanley's vindication of this case in Harmood v. Oglander, 6 Ves. 221.‖

By deed, in 1750, S was made tenant for life, remainder to his son in tail, and, in 1651, the father and son joined in a bargain and sale to W, and his heirs, to make him a tenant to the *præcipe* in order to suffer a common recovery, the uses of which were declared to be to S, the father, for life, remainder to the son in fee-simple. Trinity term began the 7th June, 1751. On the 8th of June the son made a will, whereby he disposed of all his real estate. In the same term a writ of entry was sued out returnable *Quinden Trin.*, viz., 16th June, and the recovery was completed the same term. Soon afterwards the testator died. And a doubt arising as to the validity of the will, a case was sent out of Chancery for the opinion

of the Court of King's Bench; and the question was, Whether the lands in dispute passed by this will made after the bargain and sale, and after the beginning of the term, but before the return of the writ of entry? And the Court of King's Bench certified that the will was valid. The foundation of which opinion seems to have been, that the court considered the whole transaction as one conveyance, each part whereof must relate to the date of the bargain and sale, which was the principal part, and which was perfected, made absolute, and delivered from objections, by the subsequent ceremonies.

Selwyn v. Selwyn, 1 Black. R. 251; S. C. 2 Burr. 1131. So explained by Lord Mansfield, 4 Burr. 1962, and S. C., 1 Black. R. 706.

So, in 1724, a copyhold estate was surrendered to the uses of a marriage settlement, which left in the surrenderor the reversion in fee, and a power to devise the same by will; afterwards a surrender was made by him to the use of his will, and a will made accordingly. Then, in 1751, the surrenderor was called upon by the steward to be admitted to some of the particular estates created by the original surrender in 1724, which was done. And the question was, Whether this admittance operated as a revocation of the prior will? And the court held that it did not: because the whole transaction might be considered as one and the same, and then the admittance in 1751 would *relate* to the surrender in 1724, and be prior to the will.

[Roe on the dem. of Noden v. Griffiths, 1 Black. R. 605; S. C. 4 Burr. 1952.] ‖See Vawser v. Jeffery, 3 Barn. & A. 462; 2 Swanst. 268.‖

Tenant in tail, remainder to himself in fee, devises his lands to A, and then suffers a recovery to the use of himself in fee, and dies without issue male: this is a revocation of the will.

3 P. Wms. 163, Marwood v. Turner; ‖and see 7 Term R. 416, note.‖

‖So, if a testator, after having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making any new will; the will made prior to the fine is thereby revoked.

Doe v. Dilnot, 2 New R. 401.‖

A, 23d June, 1729, made his will, and executed two duplicates thereof before three witnesses, and made B and C (since deceased) executors; and one of the duplicates was delivered to B. A died 2d October, 1730, and about three weeks before his death he made several alterations and obliterations with his own hand, in the duplicate remaining in his own custody, making a new devise of his real estate, and a new residuary legatee, and a new executor, entirely striking out the names of the first devisees, residuary legatee, and executors, and altered several of the former legacies, and inserted or interlined new legacies; and soon after wrote another will with his own hand, agreeable in a great measure, but not altogether, to the will or duplicate so altered, with a conclusion in these words: "In witness whereof, I, the said testator, have to each sheet set my hand, and to the top, where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date, this day of 1730." But there was no signing or fixing together. The testator soon after began to write another will, word for word with the last, so far as it goes, but went no farther than devising his lands. He lived six days after, and was in good health, and might have finished and executed both or either of the latter

wills if he had thought fit. He never sent or called upon B for the duplicate of the first will in his hands, though B lived in town. After the death of the testator, all the testamentary papers or schedules were found lying all in loose and separate papers upon a table in his closet, not signed or executed; and the duplicate of the first will was found on the same table, altered and obliterated, (*ut suprà*,) with his name and seal thereto whole and uncancelled. Sentence was given in the Prerogative Court, for the duplicate of the first will in B's hands, and confirmed upon appeal to the delegates, viz., Lord Raymond, C. J., and Probyn, J., Dr. Tindale, and Dr. Bramston, (who were all the delegates present,) after four days' solemn hearing; and upon a commission of review, (granted by Lord Chancellor King, upon the petition of Hyde, the executor named in the new will,) was again affirmed by the opinion of all the delegates, (except Dr. Pinfold,) viz., of the judges, Reynolds, C. B., Page, J., and Comyns, B., and two doctors of the civil law, chiefly on the reason, as the reporter says he heard, that the testator did not intend an intestacy, and by the alterations and obliterations in his own duplicate of his first will, he appeared only to design a new will, which, as he never perfected, the first ought to stand; and testator not calling for the duplicate of the first will in B's hands, strengthens the presumption of his intent not absolutely to destroy his first will till he had perfected another, which he never did.

Vin. Abr. tit. *Devise*, (R), 2, pl. 17, Hyde v. Mason.

J S devised all his real and personal estate to trustees A, B, and C, their heirs, executors, and administrators, in trust to pay 15*l. per ann.* to the plaintiffs (his two sisters) for their lives, and after several legacies, the surplus in trust for the dissenting ministers at Reading, &c., and gave 300*l.* to each trustee, and 20*l. per ann.* to each, while they took care in executing the trust. Afterward by lease and release of subsequent date to the will, the testator conveyed all his real estate unto and to the use of the said A, B, and C, and their heirs, with a proviso to be void on payment of 10*s.* And by another deed of the same date, the testator gave all his personal estate to the said A, B, and C, proviso to be also void on payment of 10*s.* But J S kept both the deeds in his own custody, and soon after died; and the said A, B, and C obtained administration *cum testamento annexo* as trustees. The trustees for some years paid the 15*l. per ann.* apiece to each of the testator's sisters; but afterwards refused to continue the payment thereof, and also refused to pay any of the dissenting ministers; but kept the rents, &c., to their own use. The two sisters, (the heirs at law,) and their husbands, brought their bill against the surviving trustee, insisting that the deed of conveyance of the real estate and the deed of gift of the personal estate had revoked the will, and that there was a resulting trust for them, as heirs at law; or at least that they (the sisters) were entitled to their 15*l. per ann.* annuities. The defendant insisted on the plaintiffs' having forfeited their annuities by bringing their bill, there being a clause in the will, that if they (the sisters) disputed the will, then they should forfeit their annuities. Lord Chancellor Talbot decreed, that the annuities should be paid to the two sisters, with the arrears and growing payments thereof; but the surplus was decreed to go to the dissenting ministers.

MS. Rep. Mich. 1734, Lloyd et ux. et al. v. Spillet et al.; [3 P. Wms. 344, S. C.; 2 Eq. Ca. Abr. 241, pl. 30, 776, pl. 25, S. C.] [This decree was affirmed on a rehearing before Ld. Hardwicke, 2 Atk. 148.]

(H) How Wills may be avoided. (*Revocation.*)

Sir John Wobrych by will, in August, 1722, devised his estate to trustees for the term of 200 years, for payment of all his debts. In December following he devised the same to other trustees for 300 years, in trust to pay some particular debts by specialty mentioned in the deed, and all encumbrances that affected the estate. In June, 1723, he died; and the question was, If the deed in December was a total revocation of the 200 years' term? And at the Rolls both terms being held to be consistent, the plaintiff now brought a bill of review; and Talbot, Lord Chancellor, was of opinion, that the deed in December was intended only as a collateral security, for payment of the debts therein mentioned, and such others as were a charge on the estate; and that Sir John did not depart from his former intentions of paying all his debts, but only to give preference to those comprised in the 300 years' term, which by law were preferred to the simple contract debts; and therefore he declared, that so much of the 200 years' term should be sold as would satisfy the purposes of the deed; and afterwards the 200 years' term should commence.

MS. Rep. Mich. 9 G. 2, Weld v. Acton, &c.

[It has been held, upon the principle that *no actual* alteration is made in the thing devised, that the changing of trustees, where the estate originally devised is only the trust, will not amount to a revocation in law. Thus, where A made his will, and devised that his feoffees in trust should make a lease to C and D for eighty years, at a certain rent payable to his executors; and, being afterwards resolved to change the feoffees in trust, caused them, or some of them, to join with him in a feoffment of the devised hereditaments to new trustees and their heirs, to the use of A and others, until A limited or ordered new uses thereof, which he never did; it was held that the feoffment was, *in equity*, no revocation of the will.

Bark v. Zouch, 1 Rep. Ch. 23; and vide Coles v. Hancock, 2 Ch. R. 109.

So, W by his will devised all his real estate in Berkshire to certain trustees and their heirs, to the use of his first and second sons, &c., successively in strict settlement, with remainder to his own right heirs; and afterwards made a codicil to his will, by which, after reciting that since the publication thereof he had contracted for the purchase of certain lands, he directed the trustees and executors in his will to pay the purchase-money out of the *residuum* of his personal estate; and that, on payment thereof, the said purchased lands should be conveyed, settled, and limited to the same uses and on the same trusts, as, by his will, he had limited and declared concerning his other estates. Afterwards the testator himself completed the purchase referred to in the codicil, and took a conveyance of the purchased estates to certain trustees, therein named, in fee, in trust for himself and his heirs, soon after which he died. And the question was, Whether the conveyance of the new purchased lands to the trustees, subsequent to the will and codicil, was not, as to those lands, a revocation? And it was decreed that this was no revocation; for, before the purchase completed, the vendor was but a trustee for the purchaser, and on the completion of the purchase was but taking the estate home.

Fullarton v. Watts, cited Dougl. 691, Canc. T. 14 G. 3; ‖2 Ves. jun. 602.‖

G, seised of manors and freehold lands in fee, by indenture mortgaged the same in fee: afterwards G, on the marriage of his son, conveyed these estates to trustees, in trust to secure an annuity to his son and his intended wife for and during the joint lives of himself and his son, and subject

thereto, to himself for life, remainder over, the ultimate remainder to himself in fee. Then G made his will, by which he devised the reversion in fee of part of these lands to trustees in fee upon certain trusts and to certain uses not material to be stated, and devised the reversion in fee of the other part to the same trustees and their heirs, in trust to sell and dispose thereof, and, with the money arising from the sale, to pay and discharge all principal and interest due on any mortgages or other encumbrances affecting these estates, and, from and after payment thereof, to apply the residue of such purchase-moneys in paying and discharging the fortunes therein before given to his younger children. Then the mortgagee, in consideration of the mortgage-money paid in, conveyed the mortgaged estates comprised in the marriage settlement to the trustees by lease and release to the uses and trusts therein limited, freed and discharged from all equity, terms, provisoes, and conditions of redemption. Afterwards, by lease and release, reciting the above facts, the same estates, comprised in the marriage settlement, were conveyed by the trustees to a trustee in trust for G in fee. Then G died without having done any other act to revoke or alter his will. And one question was, Whether these instruments amounted in law to a revocation? And it was contended that they did; for, at the time of the will, the legal estate was in the mortgagee, and, after the will, was transferred from her and conveyed to a trustee; and, though the equitable interest might have remained the same after the conveyance to the trustee, yet, there having been an alteration of the legal estate after the will, that, it was said, would operate as a revocation. *Sed per curiam*, unanimously,—G, at the time of the devise, had merely the equitable fee in him, the mortgagee was his trustee. Then, on payment of the mortgage money, she conveyed the legal estate in fee to the trustee, which was merely transferring it from one trustee to another; and there has been no determination or case in which the change of a trustee has been held to revoke a will. Therefore the court thought the will was not revoked.

Doe v. Pott, Dougl. 710. ‖See *per* Ld. Eldon, 11 Ves. 554.‖

Where one partner gave by his will to two of his partners one-ninth of one-twelfth of the profits reserved to him, over and above her shares reserved to them by the articles of copartnership; and afterwards, on the expiration of the partnership under those articles, renewed it with those same partners, and gave them a greater interest than they had under the former articles; Lord Hardwicke held, that the renewal of the articles was not a revocation of the will.

Backwell v. Child, Ambl. 260.]

{A testatrix gave a fund over which she had a power of appointment, and some specific articles, to trustees in trust for her residuary legatee afternamed; and gave the general residue to A. By a codicil she revoked the bequest of the residue, and gave it to A and B. A was held to be solely entitled to the fund under the appointment and the specific articles, they being separated from the residue by the testatrix.

6 Ves. J. 153, Roach v. Haynes; 8 Ves. J. 584, S. C.}

2. In what Cases the Court will set aside a Will for Fraud: ‖and where such Fraud is examinable.‖

Jekyll, Lord Commissioner, took a difference between a will and a deed gained upon a weak man, and upon a misrepresentation or fraud; for if a

will be gained from such by false misrepresentation, this is not a sufficient reason to set it aside in equity; as was determined in the Duke of Newcastle's will, betwixt Lord Thanet and Lord Clare, and in the case of Bodvil and Roberts: but, where a deed, which is not revocable as a will is, is so gained from such a person, and without any valuable consideration, the same ought to be set aside in equity.

2 P. Wms. 270, James v. Greaves.

[So, Lord Hardwicke, in the case of Bennett and Wade, said, that so far as the bill sought to set aside the will there in question, it was improper; for the court could not make a decree of that kind, but only direct an issue *devisavit vel non.*

Bennett v. Wade, 2 Atk. 324.

And, in the case of Webb and Claverden, which arose on a bill brought by the heir at law, charging fraud and circumvention in obtaining a will; Lord Hardwicke said, that the court would not determine a fraud in procuring a will, without directing a trial at law, which was done accordingly.

Webb v. Claverden, 2 Atk. 424.]

A will obtained *in extremis* and upon importunity of testator's wife, his hand being guided in the writing of his name, has been set aside.

Vin. Abr. tit. *Devise* (Z), 2, pl. 7, Moneypenny v. Brown. ‖The circumstance that one residuary legatee was the attorney who drew the will is not decisive evidence of fraud. Paine v. Hall, 18 Ves. 475.‖

A will likewise concerning land may be good at law, as being well executed, and yet be set aside in equity for fraud: As where—

A by will had devised his lands to M, his mother, in fee; M was afterwards told by J S, that this will would not be good, but ought to be guarded, as he called it, and that he would make another will for A, which he would take care should be sufficiently guarded. J S afterward drew a will, by which A gave the land to M, for life only, remainder to J S, in fee. Upon a bill to establish the first will, because of the ill-practices used in obtaining the after-will, Lord Chancellor Cowper directed an issue in Middlesex, where the will was made, though the lands lay in Shropshire, to try whether the will, by which the lands in fee were devised to M, was the last will of A.

1 P. Wms. 287, 289, Goss v. Tracy. If A had devised lands to M, in fee, and afterwards J S had told A, and not M, that the will was void for want of its being well guarded; and that he would make another will for A, that should be effectually guarded, and accordingly had made another will for A, whereby the estate had been devised to M, for life only, remainder to J S, in fee; this would be a good will in law, if attested pursuant to the statute of frauds, but would be set aside in equity for the fraud; but as to the evidence of the testator's being *non compos* when he made this second will, that is to be tried at law. *Per* Lord Chancellor, Ibid. 288. A will, though good at law, may yet be set aside in equity for fraud: as if A should agree to give B bank bills to the amount of 1000*l.*, in consideration that B would make his will, and thereby devise his land to A; and accordingly B does make his will, and A gives B the bank bills, which prove to be forged; this, though a good will at law, shall nevertheless be avoided in equity by A's heir for a fraud. *Per* Lord Chancellor, Ibid.; 2 Vern. R. 699. ‖See 9 Ves. 519.‖ See in 1 Chan. R. 12, 66, instances of a will of land being set aside in equity for fraud.

[A bill was brought to set aside a will for fraud, on suggestion that the testator was incapable of making it, by being perpetually in liquor, and particularly when he executed the will. And the defendant pleaded that

the will was duly executed, and that it ought to prevail, till, upon an issue at law, it should be found to be otherwise. *Per curiam*,—The plea must be allowed; for you cannot in this court set aside a will for fraud.(*a*)

Anon. 3 Atk. 47;] ‖1 Ves. & B. 542; 1 Cox. R. 353. (*a*) This is settled by the decisions in 2 Atk. 324; 3 Bro. P. C. 476; 2 P. Wms. 270; and see Roberts on Wills, 2, p. 181.‖

A bill was brought to be relieved against a will obtained by fraud and imposition, upon this case. The plaintiff's son had made a will in January, 1716, and thereby devised all his real and personal estate to the plaintiff, his father, but falling ill soon after, at a great distance from his father, of a consumption, of which he died, defendant persuaded him to make a new will, some short time before his death, whereby he devised all his real and personal estate to defendant (being his kinsman) upon trust to pay his debts and legacies; but says nothing of the *residuum;* but there was a general clause of revoking all former wills, &c. There were several witnesses to prove an imposition and contrivance, and false suggestion to induce the testator to make this new will, sufficient to satisfy the court that it was unfairly obtained, but the will was regularly signed, sealed, and published, according to the statute of 29 Car. 2, and so a good will at law. Lord C. J. Parker, having taken time to consider of it, decreed defendant to account for the personal estate, having just allowances, &c., and to convey the real estate to plaintiff, subject to the payment of testator's debts, as a trustee for the plaintiff.

Vin. Abr. tit. *Devise* (Z), 2, pl. 11; Bransby v. Keridge, &c.; [1 P. Wms. 548, S. C. cited. But this decree of Lord Parker was afterwards reversed by the Lords; 3 Bro. P. C. 358; and so, it seems, was another of his decrees of a like kind in Andrews v. Powys, 8 Vin. Abr. p. 548; 11 Vin. Abr. p. 59 & 66. For Lord Hardwicke, in Barnsley v. Powell, 1 Ves. 287, says: "*It is certainly now settled by the Lords in Bransby* v. *Keridge, that this court cannot set aside a will of personal estate for fraud, nor will I infringe on what is laid down there, and in Powys* v. *Andrews, and in the case of* Mr. *Hawkins's will;* and in Bennett v. Wade, Lord Hardwicke speaks of the case of Andrews v. Powys in like terms. But, where a will was both of real and personal estate; and as to the former it had been found by the jury to be forged, and the plaintiff's consent to probate had been procured by fraud; Lord Hardwicke, upon the ground of this fraud, and not upon any supposition of a right to examine the validity of the will in contradiction to the probate, relieved against the will, and ordered the defendants to consent to a revocation of the probate; and intimated that if this should not be consented to, he should go further and make the executors trustees. Barnsley v. Powell, *ubi suprà*. So, too, in Sheffield v. Duchess of Buckingham, 1 Atk. 630. Lord Hardwicke granted an injunction to restrain the duchess from further controverting the will of her husband; but he founded this injunction on an admission of the will by the duchess in a former suit, in which it was agreed to be well proved; and he admitted that *in an adversary way the Court of Chancery or a court of law could not determine on the validity of a probate.* See Mr. Hargrave's learned argument *on the effect of sentences of courts ecclesiastical in cases of marriage.*]

A bill was likewise brought to set aside a will of a personal estate, and to stay the probate, upon a suggestion of its being obtained by fraud; and the defendant demurred to the jurisdiction of Chancery, whereupon an injunction was moved for, insisting that the demurrer confessed the fraud, and that fraud was cognisable in equity as well as in the spiritual court; but the injunction was denied.

2 P. Wms. 286, Stevenson v. Gardiner. And *per cur.* the spiritual court has jurisdiction of fraud relating to a will of personal estate, and can examine the parties by way of allegation touching the same, and if the will was read falsely to testatrix, then it was not her will. Ibid. {See 5 Ves. J. 647.}

(H) How Wills may be avoided. (*Fraud.*)

{Parol evidence may be given of questions asked by the testator at the time of executing his will, whether the contents were the same as those of a former will, to which he was answered in the affirmative; in order to set aside the latter will on the ground of fraud. So evidence may be given to show that one paper was substituted for another.

8 Term, 147, Doe v. Allen.

So parol evidence to show that the testator executed a will under duress may be received; but the subsequent declarations of the testator himself to that effect are not admissible.

2 Johns. Rep. 31, Jackson v. Kniffen, by three judges against two. See 2 Binn. 406, Havard v. Davis.

A particular clause inserted in a will by fraud or mistake may be expunged, and the rest of the will established.

Barton v. Robins, Parmenter v. More, Garnett v. Sellers, Price v. Barnsley, and Bridge v. Arnold, cited 5 Ves. J. 639.

And an addition has been made to a will, where a clause was omitted by mistake.

Thus the testator, Dr. Gerrard, had given instructions to an attorney to make his will, and a few months afterwards wrote to the attorney to appoint another executor, and directing his wife's name to be inserted as residuary legatee. The attorney forgot her Christian name, and therefore left a blank for her name; and the will being returned to the testator he did not fill up the blank; but her name appeared in the instructions. The omission being accounted for, the will, together with the instructions, was pronounced for as the last will of the deceased.

5 Ves. J. 640.

A similar case occurred upon the will of a Mr. Janssen, containing a provision for his two daughters, and giving instructions to his attorney for giving the residue to one of them. That direction was at the top of the instructions. The attorney thought it better to put the residuary clause at the end, but when he got to the end he forgot it; and the testator did not observe the omission. The delegates established the appointment in favour of the daughter as residuary legatee.

5 Ves. J. 640. See 8 Ves. J. 97, Holder v. Howell.}

Where a bill is brought to prove a will of lands, the sanity of the testator must be proved; but it is otherwise in case of a deed of trust to sell for payment of debts.

3 P. Wms. 93, Harris v. Ingledew. A will was set aside after forty years' possession under it, upon account of the insanity of the devisor, and although in prejudice of a purchaser. Vin. Abr. tit. *Devise* (Z), 2, p. 169, Squire v. Pershall. {The sanity of the testator is to be presumed until the contrary appears: the proof of his mental incapacity lies upon him who alleges it. But after a general derangement has been shown, it is then incumbent on the other side to prove that the testator was sane at the very time when the will was executed. 5 Johns. Rep. 144, Jackson v. Van Dusen. *Antè*, Vol. v. p. 7; *contrà*, 1 Mass. T. Rep. 71, Phelps v. Hartwell; Ibid. 335, Blaney v. Sargeant. As to the proof of sanity, see further 3 Mass. T. Rep. 330, Poole v. Richardson; 1 Wash. 225; 1 Hen. & Mun. 476, Temple & Taylor v. Temple; 1 Bay, 335, Heyward v. Hazard.}

A will hath relation only to the testator's death, and not to the making; for till his death he is master of his own will: and therefore the will of a papist in Ireland was held to be avoided by a subsequent statute made in

that kingdom, which enacts, that the lands of papists there shall not be devisable, but descend in gavelkind.

Vin. Abr. tit. *Devise*, (H), 6, pl. 7, Burk v. Morgan.

It has been said, that wills (of personal estates only) though gained by fraud, if proved in the spiritual court, are not to be controverted in equity. Thus, where—

A made his will, and thereby gave the plaintiff the greatest part of his personal estate, to the value of 5000*l.*, as was proved in the case; but one B, his maid-servant, had, in his sickness, prevailed on him (as was alleged) to make another will, and to marry her a week before his death, when he lay in his sick bed, at six of the clock at night, though it was really proved by two ministers, that she was, a year before, actually married to the defendant M, and was then his wife; and that M procured the license for the marriage of A to B. And this will being set up by M, executor to B, though it appeared there was as gross practice as could be, in gaining the will, the testator being *non compos*, both at the time of making this will, and also at the time of his supposed marriage; and that in his health he knew that M and B were married; and that B suppressed the first will: yet that will so set up, being proved in the Prerogative Court, and the matter in question being purely relating to the personal estate, the Lord Chancellor was of opinion, that whilst that probate stood, this matter was not examinable in Chancery; and though the fraud was fully proved, and was opened to him, he would not hear any proofs read, but dismissed the bill.

2 Vern. 8 & 9, Archer v. Mosse.

So, where an executor proved a will of a personal estate, wherein one of the legacies was forged, it was decreed, that the executor had no remedy in equity, but ought to have proved the will, with a special reservation as to that legacy.

1 P. Wms. 388, Plume v. Beal.

But though wills (of personal estates only) gained by fraud, and proved in the Spiritual Court, are not to be controverted in equity, yet if the party claiming under such will comes for any aid in equity he shall not have it.

2 Vern. 76, Nelson v. Oldfield.

It has been determined likewise, that the courts of equity can hold plea concerning a legacy, and likewise concerning the devise of the *residuum*, which is but a legacy: and they may, in notorious cases, decree a legatee, who has obtained a legacy by fraud, to be a trustee for another; as if the drawer of the will should insert his own name instead of the name of a legatee.

1 Stra. 673, Marriot v. Marriot.

||And where a strong case was made out on affidavits of the executor's undue influence over the testatrix, of her habitual intoxication, &c., the Court of Chancery granted an injunction to restrain the executor claiming under the will and under an alleged gift *inter vivos*, from converting the property into money.

Edmunds v. Bird, 1 Ves. & B. 542; and see 6 Ves. 172; 2 Ves. & B. 262.||

But it has been decreed in the House of Lords, that a will of a real estate could not be set aside in a court of equity for fraud or imposition,

but must first be tried at law on *devisavit vel non*, being matter proper for a jury to inquire into.

1 Abr. Eq. Cas. 406, Bransby v. Keridge. ‖See Jones v. Jones, 7 Price, 663; Trimbleston v. D'Alton, 1 Bligh. R. N. S. 427.‖

‖On an issue of *devisavit vel non*, directed by the Court of Chancery to try the validity of the will of Mr. Bennett, tried at the bar of the Court of Exchequer, the heir at law sought to set aside the will on the ground of weakness in the testator, and dominion exercised over his mind by others. It appeared that he was naturally weak and childish, and drank to such an excess as to affect both body and mind, and was under the influence of the devisee, a woman for whom he had an inclination. The Chief Baron Eyre, in summing up, told the jury there was another ground, which, though not so distinct as actual force, yet, if it could be proved, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity to general purposes, and of sufficient soundness to regulate his affairs in general, yet if such dominion were acquired over him as to prevent his exercise of that discretion, it would be equally inconsistent with the idea of a disposing mind; and perhaps the most probable instance of such a dominion being acquired was, that of an artful woman, like the present, having taken possession of a man and subdued him to her purpose. The case must turn on one or other of these grounds,—either on the general capacity of Mr. B. to act for himself in the momentous instance of making his will, or on the ground of dominion or influence acquired over him by the woman. He did not think it necessary to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question whether he was of sound and disposing mind, memory and understanding. A man, perhaps, might not be insane, and yet not equal to the important act of disposing of his property by his will. His lordship, on the whole, thought the weight of evidence in favour of the plaintiff; and the jury found accordingly in favour of the will.

Mountain v. Bennett, 1 Cox's R. 353.‖

β An alteration made in a will by a person claiming under it, whether material or immaterial, renders it void.

Jackson v. Malin, 15 Johns. 293.

But an immaterial alteration to a will, made by a stranger, does not invalidate it.

Malin v. Malin, 1 Wend. 625. *g*

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